Argument—Continued
I. Public Resolution No. 10, etc.—Continued Page
4. No constitutional limitations are infringed by the Resolution 46
A. The Joint Resolution does not violate the due process clause of the Fifth Amendment 46
(i) The Legal Tender cases are conclusive that sections 1 and 2 of the Joint Resolution do not violate the fifth amendment 50
(ii) Aside from the Legal Tender cases, the decisions of this Court upon the exercise by the Congress and by the legislatures of the various States of powers other than the monetary powers sustain the proposition that the Joint Resolution does not constitute a deprivation of property without due process of law 55
B. The Joint Resolution does not violate section 4 of the Fourteenth Amendment 61
5. The Joint Resolution may not be attacked as a taking of private property without just compensation 68
6. The United States as a contractor is not liable to respond in damages in the Court of Claims for any breach of its proprietary and corporate contracts due to its public and general acts as a sovereign 78
II. Section 1 of the Joint Resolution of June 5, 1933, has the effect of withdrawing the consent of the United States to be sued on gold clauses 80
Conclusion 84

CITATIONS

Cases:

Atlantic Coast Line Railroad Company v. *Goldsboro*, 232 U. S. 548 56
Batavia Petroleum Co. case 32
Booth v. *United States*, 291 U. S. 339 83
Bowditch v. *Boston*, 101 U. S. 16, 18 79
Boyd v. *Alabama*, 94 U. S. 645 57
Bronson v. *Rodes*, 7 Wall. 229 18, 38, 41, 49, 64
Brooks-Scanlon Corp. v. *United States*, 265 U. S. 106, 123 75
Buchegger v. *Shultz*, 13 Mich. 420 41
Butchers Union Company v. *Crescent City*, 111 U. S. 746 56
Butler v. *Horwitz*, 7 Wall. 258 64, 66
Calhoun v. *Massie*, 253 U. S. 170 59
C., B. & Q. R. R. Co. v. *Drainage Commissioners*, 200 U. S. 592 56, 59

Cases—Continued

	Page
C., B. & Q. R. R. Co. v. *Nebraska*, 170 U. S. 57	56
Chicago and Alton R. R. Co. v. *Tranbarger*, 238 U. S. 67	56, 57, 59
Chicago, Burlington &c. R'd. v. *Chicago*, 166 U. S. 226, 255	59
Cincinnati v. *Louisville & Nashville R. R. Co.*, 223 U. S. 390, 400	77
Collector v. *Richards*, 23 Wall. 246	41
Corliss Company v. *United States*, 10 Ct. Cls. 494, 502, aff'd 91 U. S. 321	78
DeGroot v. *United States*, 5 Wall. 419, 432	81
Deming v. *United States*, 1 C. Cls. 190, 191	79
Denver & R. G. R. R. Co. v. *Denver*, 250 U. S. 241	57
Dewing v. *Sears*, 11 Wall. 379	66
Douglas v. *Kentucky*, 168 U. S. 488	51
Feist v. *Société Intercommunal Belge d'Electricité*, 1934, A. C. 166	17
Hepburn v. *Griswold*, 8 Wall. 603	44, 64
Home Building and Loan Association v. *Blaisdell*, 290 U. S. 398, 435	55, 57, 59, 61
Horowitz v. *United States*, 267 U. S. 458	55, 79
Illinois Central Railway v. *Illinois*, 146 U. S. 387	57
Irving Trust v. *Hazlewood* (N. Y.), 148 Misc. 456	36
Jones v. *United States*, 1 C. Cls. 383, 384	78, 79
Juilliard v. *Greenman*, 110 U. S. 421	37, 38, 64
Kennedy v. *Conrad* (Colo.), 78 Cong. Rec. 5953, 5955	8
Legal Tender Cases, 12 Wall. 457	16, 37, 38, 40, 43, 45, 48, 51, 53, 60, 65, 67
Ling Su Fan v. *United States*, 218 U. S. 302	41, 49, 50, 75
Long Island Water Supply Co. v. *Brooklyn*, 166 U. S. 685, 690	76
Louisville & Nashville Railroad Company v. *Mottley*, 219 U. S. 467	45
Lynch v. *United States*, 292 U. S. 571, 579	55, 69, 80
Maryland v. *R. R. Co.*, 22 Wall. 105, 108	66
Monongahela Navigation Co. v. *United States*, 148 U. S. 312, 326	72, 76
National Bank v. *United States*, 101 U. S. 1	41, 42, 50
New Orleans Gas Light Co. v. *Drainage Commission*, 197 U. S. 453	59
Newton v. *Commissioners*, 100 U. S. 584	57
Northern Pac. Ry. Co. v. *Duluth*, 208 U. S. 583	59
N. Y. & N. E. Railroad Co. v. *Bristol*, 151 U. S. 556	57
North American Co. v. *United States*, 171 U. S. 110, 137	57, 59
Olson v. *United States*, 292 U. S. 248, 255	72, 75
Ommia Commercial Company, Inc., v. *United States*, 261 U. S. 502, 508, 513	76
Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393	79
Reading Steel Casting Company v. *United States*, 268 U. S. 186, 188	78

Cases—Continued Page

Rodes v. *Bronson*, 34 N. Y. 649 41
Royal Dutch Shell Case 32
Savage's Case, 8 C. Cls. 545, aff'd. 92 U. S. 382 54
Schollenberger v. *Brinton*, 52 Pa. St. 9 41
Serbian and Brazilian Bond Cases, P. C. I. J. Series A, Nos. 20–21 (1929) 17
Soderberg v. *Copenhagen Tel. Co* 32
Stone v. *Mississippi*, 101 U. S. 814 56, 57
Straus v. *American Publishers' Ass'n*, 231 U. S. 234 57
Trebilcock v. *Wilson*, 12 Wall. 687 64
United Shoe Machinery Co. v. *United States*, 258 U. S. 451, 463 57, 69
United States v. *Bank of Metropolis*, 15 Pet. 377, 391, 392 78
United States v. *Bankers Trust Co.* (#471 and #472) 4
United States v. *Minnesota Investment Co.*, 271 U. S. 212 69
United States v. *State Bank*, 96 U. S. 30, 36 78
Veazie Bank v. *Fenno*, 8 Wall. 335 41, 42, 50
Warnibold v. *Schlichting*, 16 Ia. 244 41
Wilson v. *United States*, 11 C. Cls. 513, 520 79
Woods v. *Bullens* (Mass.), 6 Allen 516 41

Opinions of the Attorney General:
15 Opinions A. G. 233 9

United States Constitution:
Fourteenth Amendment, Section 4 61
Fifth Amendment 46, 68

Statutes:
Act of July 31, 1789, 1 Stat. 29, 41 41
Act of June 28, 1834, 4 Stat. 699 41
Act of January 18, 1837, 5 Stat. 136 19, 41
Act of July 27, 1842, c. 66, 5 Stat. 496 41
Act of February 25, 1862, 12 Stat. 345 30
Act of March 3, 1863, c. 73, 12 Stat. 709 8, 18
Act of March 3, 1864, 13 Stat. 13 8, 18
Act of March 18, 1869, c. 1, 16 Stat. 1 9, 18, 64
Refunding Act of July 14, 1870, 16 Stat. 272 10, 11
Act of March 3, 1873, c. 265, 17 Stat. 602 41
Act of November 1, 1893, c. 8, 28 Stat. 4 24
Act of June 13, 1898, 30 Stat. 448, 467 12
Act of March 14, 1900, c. 41, 31 Stat. 45 12, 24, 33, 43
Act of June 28, 1902, 32 Stat. 481, 484 8, 12
Act of August 5, 1909, 36 Stat. 117 12
Act of February 4, 1910, c. 25, 36 Stat. 192 12
Act of June 25, 1910, 36 Stat. 817 12
First Liberty Bond Act, 40 Stat. 35 11, 23
Second Liberty Bond Act, approved September 24, 1917, 40 Stat. 288 3, 23

Statutes—Continued Page

Act of February 13, 1925, Section 3 (a), c. 229, 43 Stat. 936, 939 ... 1
Act of March 9, 1933, 48 Stat. 1 ... 42
Act of May 12, 1933, 48 Stat. 31 ... 33, 35
Public Resolution No. 10, 73rd Congress, approved June 5, 1933, 48 Stat. 112 ... 2, 4, 35
Gold Reserve Act of 1934, 48 Stat. 337, 340 ... 32, 42, 51
Federal Reserve Act, 38 Stat. 251, 274 ... 24, 43
Senate Concurrent Resolution, 45th Congress, 2d Session ... 9

Miscellaneous:

The Annalist, 1933 and 1934 ... 75, 93
Blaine, "*Twenty Years of Congress*", vol. 2, 190 ... 67
Burdick, *The Law of the American Constitution*, Sec. 228 ... 67
Collier, Charles S., *Gold Contracts and Legislative Power*, 2 The George Washington Law Review, pp. 303, 309 ... 40
Dewey, D. R., *Financial History of the United States*, 11th ed. (1931), pp. 442-445 ... 20, 67, 68
Dunning, *Essays on the Civil War and Reconstruction* (1931), 118 ... 67
Eder, Phanor J., *A Forgotton Section of the Fourteenth Amendment*, 19 Cornell Law Quarterly 1 (1933) ... 63
Eriksson & Rowe, *American Constitutional History* (1933), 301 ... 67
Flack, *The Adoption of the Fourteenth Amendment* (1908), 133 ... 67
Guthrie, *The Fourteenth Amendment* (1898) 17 ... 67
Hall, James Parker, *Constitutional Law, American Law and Procedure*, Vol. XII, pp. 242, 243 ... 57
Hepburn, A. Barton, *A History of Currency in the United States* (1924), pp. 348, 354, 358 ... 20
Kendrick, *Journal of the Joint Committee on Reconstruction*, pp. 282-284 ... 91
Leffingwell, Russell, *Proceedings of the Academy of Political Science*, Vol. XVI, No. 1, April 1934, p. 76 ... 25
Madden and Nadler, Bulletin No. 27, Special Bulletin No. 4, Institute of International Finance, August 4, 1929, "*Gold Clause*", page 3 ... 8, 26
Madden & Nadler, *Foreign Securities* (1929) page 317 ... 26
Magruder, *The Constitution* (1933), 328 ... 69
Moody's *Investment Survey*, 1933, 1934 ... 29, 75
Nussbaum, Arthur, *Comparative and International Aspects of American Gold Clause Abrogation*, 44 Yale Law Journal 53, 55 ... 8, 33, 67
Story, *Constitution* (5th ed.), Sec. 1965 ... 67
Watson, *The Constitution of the United States* (1910), 1657 ... 67

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 532

JOHN M. PERRY

v.

THE UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Court of Claims has rendered no opinion.

JURISDICTION

The certificate of the Court of Claims was filed November 16, 1934. The jurisdiction of this Court rests on Section 3 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939.

QUESTIONS PRESENTED

The questions certified by the Court of Claims are as follows:

"1. Is the claimant, being the holder and owner of a Fourth Liberty Loan 4¼% bond of the United

States, of the principal amount of $10,000, issued in 1918, which was payable on and after April 15, 1934, and which bond contained a clause that the principal is 'payable in United States gold coin of the present standard of value', entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?

"2. Is the United States, as obligor in a Fourth Liberty Loan 4¼% gold bond, Series of 1933–1938, as stated in Question One, liable to respond in damages in a suit in the Court of Claims on such bond as an express contract, by reason of the change in or impossibility of performance in accordance with the tenor thereof, due to the provisions of Public Resolution No. 10, 73rd Congress, abrogating the gold clause in all obligations?"

STATUTES AND ORDERS INVOLVED

The pertinent statutes and orders involved are set forth in the Appendix under separate cover.

STATEMENT

The bond held by the claimant, a citizen of the United States, is one of the series of Fourth Liberty Loan "4¼% Gold Bonds" of 1933–1938, in the principal amount of $10,000 payable on October 15, 1938, or at any time after October 15, 1933, at the option of the defendant (Ctf. 1). The text of the bond contains the provision: "The principal and interest hereof are payable in United States gold coin of the present standard of

value." The series was authorized by the Second Liberty Bond Act, approved September 24, 1917 (40 Stat. 288), as amended, which provided that the "principal and interest" of the bonds issued thereunder should be "payable in United States gold coin of the present standard of value." The bonds were issued pursuant to Treasury Department Circular No. 121, dated September 28, 1918, in which the Secretary of the Treasury stated that he invited "subscriptions, at par and accrued interest, from the people of the United States for six billion dollars of United States of America Four and One-Quarter Per Cent Gold Bonds of 1933–1938" (Ctf. 2).

In accordance with the privilege of redemption set forth in said circular and in the authorizing statute, the Secretary of the Treasury by Treasury Department Circular No. 501, dated October 12, 1933, called the bond of the claimant, among others, for redemption on April 15, 1934 (Ctf. 2). On May 23, 1934, the claimant presented his bond to the defendant and demanded redemption by payment of 10,000 gold dollars, each containing 25.8 grains of gold 0.9 fine (Ctf. 2, 3). The defendant refused to comply with the claimant's demand for payment in gold dollars of such weight and fineness, whereupon the claimant demanded 258,000 grains of gold 0.9 fine, or gold of equivalent value of any fineness, or 16,931.25 gold dollars, each containing $15\frac{5}{21}$ grains of gold 0.9 fine, or 16,931.25 dollars in legal-tender currency (Ctf. 3). The defend-

ant also refused to accede to any of these demands, but offered payment of $10,000 in legal tender money (Ctf. 3).

On June 22, 1934, a petition was filed in the Court of Claims claiming damages in the sum of $16,931.25. The Government demurred to the petition on the ground that no cause of action had been stated (Ctf. 4).

The Court of Claims requesting appropriate instructions from this Court certified the two questions quoted above on November 16, 1934.

As the argument contained in the Government brief in *United States* v. *Bankers Trust Co.* (No. 471 and No. 472) is equally applicable to this case, that brief is hereby adopted as part of this brief. The discussion herein contained will be devoted to additional considerations not treated in the companion brief.

SUMMARY OF ARGUMENT

Public Resolution No. 10 of the 73rd Congress, approved June 5, 1933, declares that gold clauses are contrary to public policy and provides that obligations payable in money of the United States, whether or not such clauses are contained therein, shall be discharged by payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. As used in the Resolution "obligations" includes "every obligation of and to the United States" payable in money of the United States. The Reso-

lution is constitutional and is controlling in the case at bar.

There were compelling reasons for the recognition and declaration by the Congress that gold clauses are contrary to public policy. Whatever justification may have existed for such clauses under the dual monetary system which prevailed during and following the Civil War, and which entailed the circulation of two kinds of money at differing values and receivable for different payments, the justification was ended by our departure from that system. Gold clauses are inconsistent with the present policy of the Congress to maintain at all times the equal power of every dollar in the markets and in the payment of debts and to accord equal legal tender qualities to all forms of money in the payment of governmental and other kinds of debts.

The authorization of gold clauses by the Congress in 1917 which could not have foreseen the post-war monetary and economic developments does not render unreasonable the Congressional determination in 1933 that such clauses are against public policy.

The recent emergency has shown that gold clauses constitute a serious obstruction to the effective exercise by the Congress of its monetary and other powers. Their effect, if enforced, is of such serious consequence as substantially to deprive the Congress of the power to regulate the value of the dollar. Gold clauses would, if enforced, interfere with recent monetary measures

adopted to protect the gold reserves of the United States, to provide a more effective use of those reserves, and to regulate and protect the interstate and foreign commerce of the United States. These monetary measures were necessary, in the judgment of the Congress, to cope with the disorganized financial and economic conditions which arose out of the World War and reached their crisis in the United States in 1933. Only by declaring that gold clauses should not be enforceable in public as well as private obligations was the Congress able to take the steps required to meet these conditions.

The recent monetary legislation, of which the Joint Resolution is the keystone, was clearly embraced within the delegated and sovereign powers of the Congress. Substantially similar measures have frequently been taken in the past, pursuant to the powers to coin money and regulate the value thereof; to assure, in accordance therewith, a uniform value to the coins and currency of the United States; to borrow money on the credit of the United States; and to regulate foreign and interstate commerce and exercise a measure of control over international relations.

Objections under the due-process clause, if applicable to the present proceedings, are answered by the fact that the Resolution was an appropriate

and, in the judgment of an impressive majority of the Congress, a necessary means of assuring the effective exercise by the Congress of its delegated and sovereign powers.

The Joint Resolution does not question the validity of the public debt and does not violate Section 4 of the Fourteenth Amendment.

The Congressional determination respecting the money which may be tendered for debts (whether or not gold clauses have been included with respect thereto) can be applied to public as well as private debts, without in any sense questioning the validity of the debt.

Objections under the just-compensation clause of the Fifth Amendment, if applicable to the present proceedings, are answered by the fact that there has been no "taking"; and even if it could be said that there was a taking, provision for just compensation was made.

The Resolution is controlling in the case at bar. It is well established that the United States as defendant in the Court of Claims, may plead in defense, general legislation enacted by the United States in its sovereign capacity for the public good.

The effect of Section 1 of the Joint Resolution of June 5, 1933, is to withdraw the consent of the United States to be sued on gold clauses. Such a withdrawal is constitutional.

ARGUMENT

I

PUBLIC RESOLUTION NO. 10, APPROVED JUNE 5, 1933, IS CONSTITUTIONAL AND CONTROLLING IN THE CASE AT BAR

1. The gold clause

A. In General

The phrase "gold clause" is used to refer to a number of provisions calling for a particular kind of payment. The chief types are three in number and have appeared in both public and private obligations. The first and earliest type, common in the middle of the last century, calling for payment in coin [1] of no defined weight or fineness, is represented by the statutory provisions authorizing certain obligations issued by the Government during the Civil War.[2] Another type of clause, more accurately described as a "gold-value clause",[3] provides for payment in gold coin, or, as an

[1] In the earlier obligations, the provision was for "coin", but certain later issues expressly provide for gold coin. Of the latter type are the bonds issued under the Act approved June 28, 1902, 32 Stat. 481, 484. So also was a private bond under consideration in *Kennedy* v. *Conrad* (Colo.) unreported but quoted in 78 Cong. Rec. 5953, 5955.

[2] Act approved March 3, 1863, c. 73, 12 Stat. 709; Act approved March 3, 1864, 13 Stat. 13.

[3] Bulletin No. 27, Special Bulletin No. 4, Institute of International Finance, August 4, 1929, Madden and Nadler, "Gold Clause", page 3; Arthur Nussbaum, *Comparative and International Aspects of American Gold Clause Abrogation*, 44 Yale Law Journal, 53, 55.

alternative, in an amount in money measured thereby. A coin provision of this general type was made applicable to the bonds of the United States by an Act approved March 18, 1869,[4] which pledged the faith of the United States to payment in "coin or its equivalent" of certain of the obligations of the United States. It will be noted, however, that this statute provides for payment in any coin[5] with-

[4] C. 1, 16 Stat. 1. The language is as follows: "* * * the faith of the United States is solemnly pledged to the payment in coin or its equivalent of all the obligations of the United States not bearing interest, known as United States notes, and of all the interest-bearing obligations of the United States, except in cases where the law authorizing the issue of any such obligation has expressly provided that the same may be paid in lawful money or other currency than gold and silver. But none of said interest-bearing obligations not already due shall be redeemed or paid before maturity unless at such time United States notes shall be convertible into coin at the option of the holder, or unless at such time bonds of the United States bearing a lower rate of interest than the bonds to be redeemed can be sold at par in coin. * * *"

[5] See Senate Concurrent Resolution, adopted by the 45th Congress, 2d Session, in the Senate on January 25, 1878, and concurred in by the House on January 28, 1878, which provided as follows: "That all the bonds of the United States issued, or authorized to be issued, under the said acts of Congress hereinbefore recited are payable, principal and interest, at the option of the Government of the United States, in silver dollars, of the coinage of the United States, containing 412½ grains each of standard silver; and that to restore to its coinage such silver coins as a legal tender in payment of said bonds, principal and interest, is not in violation of the public faith, nor in derogation of the rights of the public creditor." See also 15 Op. A. G. 233 (1877).

out limitation as to the weight or fineness thereof. Subsequent Congresses have not followed the precedent of an alternative payment in coin value suggested by the 1869 statute, but in recent years have inserted into the obligations of the United States a gold-coin clause containing no words of equivalence. This, the third and most common type of clause in outstanding obligations, both public and private, calling for payment in gold coin of a particular standard of value, is that found in the bond of the claimant and in all other bonds issued by the United States between September 24, 1917, and June 5, 1933. In private obligations the clause generally assumes the form of a promise to pay in gold coin of the standard "of weight and fineness" of the date of issue, while in Federal obligations the phrase is gold coin of "the present standard of value."

The inclusion of the phrase "of the present standard of value" in the bond of the claimant appears to have been the result of the following of an inapplicable precedent. The phrase seems to have been used with respect to Federal obligations for the first time in the Refunding Act, approved July 14, 1870.[6] There is but one reference to the phrase in the entire Congressional discussion of that bill, and that indicates a desire to encourage

[6] 16 Stat. 272. The phrase was "coin of the present standard value."

subscriptions for the bonds abroad.[7] The claimant's bond, like every security of the United States outstanding on June 5, 1933,[8] forms part of

[7] Statement of Congressman Butler, of Massachusetts, 93 Cong. Globe, p. 5019. See also Report of the Secretary of the Treasury for the year 1869, p. XVII, and a Treasury Circular dated February 28, 1871, seeking subscriptions for bonds which tentatively reserved one-half of the ten-year 5% issue for foreign subscribers. The discussion in the Congress was as to the best method of encouraging foreign subscriptions to the bonds by fixing the most acceptable method of payment and was distinct from the question as to whether the bonds should be expressed to be payable in "coin" or in "lawful money."

[8] The Panama Canal Loan 2's 1916–1936, Panama Canal Loan 2's 1918–1938, Panama Canal Loan 3's 1961, were offered "to the public", by Treasury Department Circulars No. 62 dated July 2, 1906, No. 73 dated November 18, 1908, and No. 31 dated May 16, 1911, respectively. The First Liberty Loan 3½% bonds, the Second Liberty Loan 4% bonds, the Third Liberty Loan 4¼% bonds, and the Fourth Liberty Loan 4¼% bonds were offered to "the people of the United States" by Treasury Department Circulars No. 78 dated May 14, 1917, No. 90 dated October 1, 1917, No. 111 dated April 6, 1918, and No. 121 dated September 28, 1918. Subscriptions were invited to Treasury Bonds of the Series of 1947–1952, 1944–1954, 1946–1956, 1943–1947, 1940–1943, 1941–1943, 1946–1949, 1951–1955, 1941, 1943–1945, 1944–1946, and 1946–1948, and Victory Notes to "the people of the United States" by Treasury Department Circulars No. 307 dated October 9, 1922, No. 349 dated December 3, 1924, No. 367 dated March 8, 1926, No. 383 dated May 31, 1927, No. 405 dated July 5, 1928, No. 433 dated March 2, 1931, No. 438 dated June 1, 1931, No. 443 dated August 1, 1931, No. 490 dated July 31, 1933, No. 502 dated October 12, 1933, No. 508 dated April 4, 1934, No. 512 dated June 4, 1934, and No. 138 dated April 21, 1919, respectively. All Treasury notes, bills, and certificates of indebtedness outstanding on June 5, 1933, were offered through the Federal Reserve banks.

a domestic issue.[9] None of the outstanding gold-clause obligations of the United States was offered especially to nonresident aliens. The Congressional debates in 1917 do not indicate that consideration was given to the inclusion of the present-standard-of-value clause in the Liberty Bond bill. In the interval between the Refunding Act of 1870 and the Libery Bond Acts, certain laws had included the present-standard-of-value gold clause, while others omitted it. Committee reports and legislative debates fail to reveal why the provisions should have been included in some acts and excluded from others.[10]

---

[9] See Treasury Department Circular No. 121, dated September 28, 1918.

[10] It was not included in the Act of June 13, 1898 (30 Stat. 448, 467), authorizing the Spanish War bonds, or those of June 28, 1902 (32 Stat. 484), and August 5, 1909 (36 Stat. 117), authorizing the Panama Canal bonds; but it was included in the Act of March 14, 1900 (c. 41, 31 Stat. 45), authorizing the 2% consols, and in the Act of June 25, 1910 (36 Stat. 817), authorizing the issue of postal savings bonds. The last discussion in Congress respecting a gold clause containing such a phrase appears in the debates of the Act approved February 4, 1910 (c. 25, 36 Stat. 192) (amending the Panama Canal Bond Act of 1909), when Senator Underwood, on being asked the reason for the introduction into that bill of the present-standard-of-value gold clause, responded: "Because you [the opposing party] have established a precedent and we cannot get away from it." 45 Cong. Rec., part 2, page 1293, January 31, 1910. See also the statement of Senator Wolcott made at the time of the passage of the Act of March 14, 1900, attributing the whole gold clause to a fad, 33 Cong. Rec., Part II, page 1713.

The gold clause introduces an important problem due to the overwhelming amount of obligations calling for payment in gold coin of the old standard outstanding at the time of the passage of the Joint Resolution of June 5, 1933. The estimated amount of public interest-bearing gold clause obligations outstanding on that date reaches the figure of $25,000,000,000, including approximately $20,000,000,000 of Federal obligations.[11]

The typical clause calls for payment of interest as well as principal in gold coin. With over $20,000,000,000 principal amount of Federal interest-bearing obligations outstanding[12] on May 31, 1933, on which the average interest charge is 3½ percent, the annual interest payable in gold coin of the old standard in respect of such obligations is $700,000,000. The annual interest payable in gold coin upon the estimated $75,000,000,000 principal amount of private obligations would amount to $3,750,000,000 at an assumed annual interest rate of 5 percent.

---

[11] See pages 16 to 18 and 50 of brief in cases No. 471 and No. 472.

[12] The unmatured United States interest-bearing obligations outstanding on May 31, 1933, consisted of the following:

Bonds:		
2% Consols of 1930	$509,724,050.00	
2% Panama Canal Loan of 1916–36	48,954,180.00	
2% Panama Canal Loan of 1918–38	25,947,400.00	
3% Panama Canal Loan of 1961	49,800,000.00	
3% Conversion Bonds of 1946–47	28,894,500.00	
2½% Postal Savings Bonds (5th to 44th Series)	52,697,440.00	
		$806,017,570.00

(Footnote continued on p. 14.)

B. The Gold Clause in Claimant's Bond

The Joint Resolution applies to gold clauses of the three types described above. The gold clause in claimant's bond is of the third type, calling

---

[12] Footnote continued from page 13.

Bonds—Continued.			
First Liberty Loan			
3½% Bonds of 1932-47	$1,392,227,350.00		
Converted 4% Bonds of 1932-47	5,002,450.00		
Converted 4¼% Bonds of 1932-47	532,490,450.00		
Second Converted 4¼% Bonds of 1932-47	3,492,150.00		
		$1,933,212,400.00	
Fourth Liberty Loan—			
4¼% Bonds of 1933-38		6,268,095,250.00	
			$8,201,307,650.00
Treasury Bonds—			
4¼% Bonds of 1947-52		758,983,300.00	
4% Bonds of 1944-54		1,036,834,500.00	
3¾% Bonds of 1946-56		489,087,100.00	
3⅜% Bonds of 1943-47		454,135,200.00	
3⅜% Bonds of 1940-43		352,994,450.00	
3⅜% Bonds of 1941-43		544,916,050.00	
3⅛% Bonds of 1946-49		819,497,500.00	
3% Bonds of 1951-55		759,494,700.00	
			5,215,942,800.00
Treasury Notes:			
3% Series A-1934	$211,234,600.00		
2¾% Series B-1934	345,292,600.00		
3⅛ Series A-1935	416,602,800.00		
3¼% Series A-1936	365,138,000.00		
2¾% Series B-1936	360,533,200.00		
2¾% Series C-1936	572,419,200.00		
3¼% Series A-1937	834,401,500.00		
3% Series B-1937	508,328,900.00		
2⅝% Series A-1938	277,516,600.00		
4% Civil Service Retirement Fund—		3,924,467,400.00	
Series 1933 to 1937		219,000,000.00	
4% Foreign Service Retirement Fund—			
Series 1934 to 1937		2,057,000.00	
4% Canal Zone Retirement Fund—			
Series 1936 and 1937		2,164,000.00	
			4,147,688,400.00
Certificates of Indebtedness:			
Tax—			
1½% Series TJ-1933	373,856,500.00		
4% Series TAG-1933	469,089,000.00		
1¼% Series TS-1933	451,447,000.00		
¾% Series TD-1933	254,364,500.00		
4¼% Series TD 2-1933	473,328,000.00		
Special—		2,022,085,000.00	
4% Adjusted Service Certificate Fund—Series 1934.		96,900,000.00	
			2,118,985,000.00

(Footnote continued on p. 15.)

for payment "in gold coin of the present standard of value." The claimant contends, however, that this clause is to be construed as if it were a gold-value clause. We do not believe that the constitutionality of the Joint Resolution is any less clear as applied to one type of gold clause rather than another; and the reasoning of this brief applies generally to any one type as well as to the others. To the claimant, however, it appears important to establish that his gold clause is of the second, or gold value, type. Indeed, an analysis of his argument leads to the conclusion that he does not seriously deny the constitutionality of the Joint Resolution as applied to gold clauses of the third type which fix the mode of payment. (See especially pages 30, 34, and 38 of claimant's brief.)

For the reasons stated in pages 114 to 123 of the brief in cases No. 471 and No. 472, the gold clause in claimant's bond should be construed as fixing the mode and not the measure of payment. Claimant

---

[12] Footnote continued from page 14.

Treasury bills (maturity value):		
Series maturing June 7, 1933	$75,216,000.00	
Series maturing June 21, 1933	100,569,000.00	
Series maturing June 28, 1933	100,158,000.00	
Series maturing July 5, 1933	100,096,000.00	
Series maturing July 12, 1933	75,733,000.00	
Series maturing July 19, 1933	75,188,000.00	
Series maturing July 26, 1933	80,295,000.00	
Series maturing Aug. 2, 1933	60,655,000.00	
Series maturing Aug. 9, 1933	75,067,000.00	
Series maturing Aug. 16, 1933	75,442,000.00	
Series maturing Aug. 23, 1933	60,078,000.00	
	878,497,000.00	
Total interest-bearing debt outstanding		$21,368,438,420.00

(Compiled from Preliminary Statement of the Public Debt, May 31, 1933, appearing on page 4 of the Daily Statement for the United States Treasury for that date.)

argues, however, that gold clauses in Government bonds are different from gold clauses in private obligations because of an Act passed by the Congress in 1869. This Act, as previously mentioned, provided for the payment of certain government obligations "in coin or its equivalent", without, however, specifying the standard of weight or fineness of the coin or limiting the coin to gold, silver, or other metal. The claimant, on the basis of this statute, makes the startling suggestion that this phrase "or its equivalent", applied as it was to such coins, is to be read into his gold clause, but there applied only to gold coin of a particular standard of weight and fineness. The Act of 1869 contained nothing to prevent the Congress from reducing the content of the gold or silver dollar and discharging the obligations to which the statute referred, in coin of reduced content (*Legal Tender Cases,* 12 Wall. 457, 551, 552), whether such coins were of gold or silver.

Whatever significance the Act of 1869 may have had when it was passed has long since been lost to the claimant by subsequent legislation.[13] The principle of the parity acts is that every dollar coined or issued is equal in value to every other dollar. It

[13] For a further discussion of the Act of 1869 see footnote 49 on page 66, *infra.* The fact that subsequent gold-clause legislation enacted by the Congress departed from this language by excluding " or its equivalent ", must be taken as a positive expression of the Congressional intent to exclude the gold-value interpretation.

would be violative of the entire principle of the parity acts for the United States to agree to pay an amount in one form of money measured, however, by another form of money which it has provided shall have, and which has, the same value. An intention in 1917 to make such an agreement, inconsistent with intervening legislation, is not to be implied from the Act of 1869.

2. There was a reasonable basis for the Congressional determination that the gold clause is contrary to public policy, inconsistent with our present monetary system, and an obstruction to the exercise by the Congress of its monetary and other powers

A. Justification of the gold clause was removed when the dual monetary system was ended by the parity provisions

B. The gold clause is an obstruction to the exercise of the powers of the Congress, as shown by its bearing upon recent legislation designed to cope with the monetary and financial crisis

See brief in No. 471 and 472, pp. 18–68

The discussion on pages 44 to 68 of the brief in Nos. 471 and 472, having placed the emphasis upon the effect of the gold clause in private obligations, will now be supplemented by further consideration of the effect of the gold clause in Federal obligations.[14]

---

[14] The Government's brief in cases No. 741 and No. 742 (pp. 120–123) refers to and distinguishes the decisions of the House of Lords in the *Feist* case, and of the Permanent Court of International Justice at The Hague, in the *Serbian and Brazilian Bond* cases, which it is believed have no bearing upon the cases now before this Court. The decisions in

Consideration should first be given to the reasonableness of the Congressional action in reversing, in effect, its policy with respect to gold clauses. If the gold clause is against public policy today, why did earlier Congresses sanction its use in the obligations of the United States?

In the brief in cases No. 471 and No. 472 it is pointed out that the gold clause was not inconsistent with a dual monetary system; in fact, as indicated by the Court in *Bronson* v. *Rodes* (7 Wall. 229, 251–253), a coin clause was a natural, if not a necessary, complement of such a system. It was while this dual system existed that the Congress first provided for gold clauses as a part of a Federal securities issue.[15] It is believed that succeeding Congresses in continuing gold clauses of one type or another in Federal obligations followed a precedent which the recent emergency has disclosed to be

---

those cases turned entirely upon the meaning to be given to the gold clause in the absence of any statute intended to abrogate such clauses. As bearing upon the constitutional principles here involved or upon the sovereign power of this country to control its own currency, to regulate the value thereof, to prescribe what shall be legal tender, and to annul contracts declared by the Congress to be against public policy, the high tribunals which decided them would, no doubt, be the first to assert that they are not to be regarded by this Court even as persuasive authority.

[15] Bonds issued pursuant to Act of March 3, 1863, c. 73, 12 Stat. 709; Act of March 3, 1864, 13 Stat. 13; and Act of March 18, 1869, c. 1, 16 Stat. 272.

inapplicable after the dual monetary system was ended.[16]

Until very recently no change had been made in the standard of weight or fineness of the gold dollar since the Act of January 18, 1837 (5 Stat. 136); and, so far as can be ascertained, no serious consideration was given to any change during that period. It was not unnatural, therefore, that debtors should accept the most stringent type of gold clause without serious thought as to its true import; and that the present-standard-of-value clause or a similar clause should become standard language in practically every bond and note issued in the United States. Against such a background Federal obligations without a gold clause would have been anomalous. It was this almost universal use of the gold clause in public and private obligations that created the problem confronting the Congress in 1933. Such clauses in a few obligations might not have obstructed the power of the Congress to regulate the value of the dollar, but gold clauses in $100,000,000,000 of obligations, upon which the annual service charge was as great as the entire monetary gold stocks of the

[16] The preamble to the Joint Resolution recites: "the existing emergency has disclosed that * * * [gold clauses] * * * obstruct the power of the Congress * * * and are inconsistent with [the parity provisions]." Appendix page 38. See brief in cases No. 471 and No. 472, pages 18 to 28.

United States,[17] produced a situation which could not have been fully foreseen when earlier Congresses adopted such clauses for Federal obligations and when later Congresses followed their example.

It was natural to think after the experience of the Cleveland Administration, that only an inadequacy of the supply of monetary gold could compel the United States to suspend the redemption of its currency in gold.[18]

It required the devaluation of foreign currencies, the suspension of redemption of currencies in gold by the principal countries of the world, and the subsequent depreciation of the English pound and other leading currencies, to make clear to this country the deflationary effect of a monetary unit and a debt and credit structure tied to gold at a

---

[17] See brief in cases No. 471 and No. 472, pages 53 to 58.

[18] It was an inadequacy of gold reserves which in the opening months of the second Cleveland Administration caused the fear that redemption in gold could not be maintained by the Government. With other factors, a sharp reduction in revenues, attended by increased expenditures, and a change in the kind of money received for custom duties, had operated to drain the gold reserves down to $96,000,000.00 in April of 1893. In fact, at one time the New York Sub-Treasury was within 48 hours of gold exhaustion. D. R. Dewey, *Financial History of the United States* (11th Ed. 1931), pp. 442 to 445; A. B. Hepburn, *A History of Currency in the United States* (1924), pp. 348, 354 and 358.

level which had been abandoned by so large a part of the world.[19]

On the following page is a chart showing the extent to which the monetary units of the countries whose economic systems most directly affect our own have been devalued or permitted to depreciate.[20] The chart shows the percentage of the pre-

[19] This is well illustrated in The Annalist Weekly Index of Wholesale Commodity Prices, reproduced in claimant's brief, appendix, p. XIV.

[20] The chart, prepared by the Division of Research and Statistics, Treasury Department, was based upon the following table:

Gold value of leading currencies (October 1932 and October 1934, as percentage of pre-war parity with gold)

[Sources: Monetary Units and Coinage Systems of the Principal Countries of the World, Bureau of the Mint, Treasury Department, 1916 and 1929; League of Nations, Monthly Bulletins of Statistics]

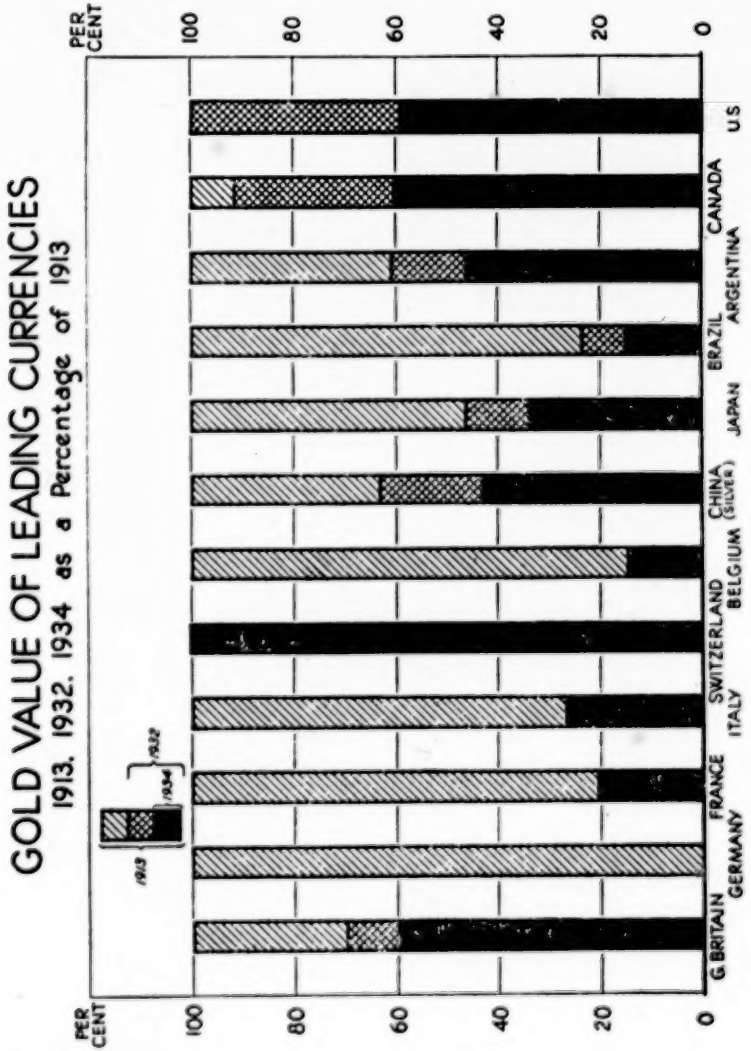
	Pre-war gold parity (U. S. cents)	Percentage of pre-war gold parity	
		October 1932	October 1934
Great Britain	486.65	69.79	59.96
Germany	23.821	----------	----------
France	19.295	20.35	20.26
Italy	19.295	26.53	26.33
Switzerland	19.295	100.03	100.34
Belgium	19.295	[1] 14.40	[1] 14.36
China	[2] 46.63	[2] 63.08	[2] 42.93
Japan	49.846	46.26	33.98
Brazil	32.44	23.49	14.92
Argentina	42.452	60.73	45.84
Canada	100.00	91.23	60.31
United States	100.00	100.00	59.06

Treasury Department, Division of Research and Statistics. Dec. 27, 1934.

[1] Values for Belgium relate to equivalent of pre-war franc or one-fifth present Belga.

[2] China has no gold unit. Pre-war parity based on price of a fine ounce of silver in New York in 1913, or $0.6124.

war parity of their currencies and our own in October 1932, when only the dollar and the Swiss franc were at 100 percent; and the ratio in October 1934



when the dollar, the pound and the Canadian dollar were each at approximately 60 percent of pre-war

parity. The currencies of all the other countries, except Switzerland, were at a still smaller percentage.

Only if it be assumed that in 1917, upon the passage of the Liberty Bond Acts (40 Stat. 35, 288), the Congress could have foreseen the economic consequences of the World War and could have envisaged the possibility of the developments of the last few years, could it fairly be said that its action in providing that the Liberty bonds should be paid in gold coin of a standard of value fixed in 1837 was a determination that such a provision was not against public policy under conditions such as those which confronted the 73d Congress in 1933. In the absence of such prescience on the part of the 65th Congress it was not unreasonable for the 73d Congress, taught by the emergency and the implications of $100,000,000,000 of gold-clause obligations, to declare such clauses against public policy.

(*i*) *The gold clause—an obstruction to the power of the Congress to maintain the parity of all coins and currencies of the United States.* (*See brief in No. 471 and No 472, pp. 45–48*)

When the Government found it necessary to suspend redemption of currency in gold, one group of private creditors would have been preferred to another, if redemption of the currency had been discontinued but the way kept open for gold-clause creditors to enforce the asserted obligation of their bonds.

The preference is accentuated in the case of Federal gold-clause obligations. Besides the holders of some $20,000,000,000 of gold-clause interest-bearing obligations of the Federal Government, there were the holders of more than $5,000,000,000 of currency issued or guaranteed by the Federal Government, not to mention the holders of a much vaster amount of obligations in the form of bank deposits, insurance contracts, and other agreements payable in currency of the United States. Gold clauses were contained in or made with respect to all of this currency; in the case of the greenbacks by a specific provision that such notes when presented to the Treasury for redemption, shall be redeemed in gold coin of the standard fixed by the Act of March 14, 1900 (c. 41, Sec. 2, 31 Stat. 45); in the case of gold certificates by the provision that they should be redeemable in gold coin on demand (c. 41, Sec. 6, 31 Stat. 47, as amended; in the case of Federal Reserve notes by the provision that they should be redeemable in gold when presented at the Treasury (Section 16, Federal Reserve Act, as amended, 38 Stat. 265); and in the case of all currency by the provisions of the parity acts that "all forms of money issued or coined by the United States shall be maintained at a parity of value with" the gold dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine (Act of Nov. 1, 1893, c. 8, 28 Stat. 4; act of March 14, 1900, c. 41, 31 Stat. 45; Federal Reserve Act of Dec 23, 1913, c. 6, sec. 26, 38 Stat. 251, 274).

Once the conviction began to gain acceptance that the United States would soon be forced to check the downward spiral of prices by cutting loose, as practically every other country had done, from its tie to the pre-war unit, a run was started on the nation's monetary stocks similar to and coincident with the run on the nation's banks.[21] The accelerated currency and gold withdrawals are illustrated by the chart appearing at page 40 of the brief in cases No. 471 and No. 472.

---

[21] "The crises in Austria and Germany caused withdrawals from London. * * * England's inability to face further deflation had been demonstrated * * *. Thus England was forced off gold.

"A year and a half later America was driven off gold too; after three great runs on our gold; after three great resulting waves of panic and deflation, in 1931, 1932, and 1933; long after every other great power, every nation indeed except Holland and Switzerland, had abandoned the pre-war standard. America resisted five long months after President Hoover had publicly stated on the authority of the Secretary of the Treasury that the country had once already been within two weeks of going off. * * *

"We had more gold than England; so we could stand the strain longer; and because we could stand it longer we suffered more. We had more gold and so we had a more top-heavy credit structure; and for that reason too we suffered more. The circumstances were different but the ultimate cause was the same. Both countries were forced off by the impossibility of maintaining both the pre-war gold parity of their currencies and the post-war price level; and the impossibility of enduring further deflation of that price level. The burden of debts had become unbearable." Russell Leffingwell, former Assistant Secretary of the Treasury. Proceedings of the Academy of Political Science, Vol. XVI, No. 1, April 1934, p. 76.

Gold payments had to be suspended until it was established whether or not the gold content of the dollar would be decreased and until the new weight of the gold dollar was determined. No reason has been advanced why the holders of the interest-bearing time obligations of the United States should, by reason of the gold clause in their bonds, be preferred to the holders of the non-interest-bearing demand obligations of the United States. These demand obligations include all of the currency of the United States as to which the undertakings of the Government are no less solemn than those in the gold-clause interest-bearing obligations.[22]

The gold clause in the Government bonds construed as a single obligation to pay coin, would have made it impossible for the United States to have suspended gold payment and to have preserved its gold reserves. The holders of $20,000,000,000 principal amount of Federal obligations, the annual interest charge on which was about $700,000,000, could in a relatively short time have

[22] A Norwegian law of December 15, 1923, quoted at page 150 of the Appendix under separate cover, recognized the necessity for equal treatment of holders of gold-clause securities and gold-clause currency. It provided that if the holder of a contract to pay gold crowns refused to accept payment in notes of the Norges bank of equal face amount, the debtor could demand a moratorium lasting as long as the Norges bank was freed of its obligation to redeem its notes in gold. (See *Foreign Securities*, Madden & Nadler (1929), page 317.)

drained all of the available gold held by the Treasury. The gold clause in Federal obligations, if enforceable by these creditors, would have transferred the destiny of the gold reserves and the destiny of the currency to private hands.

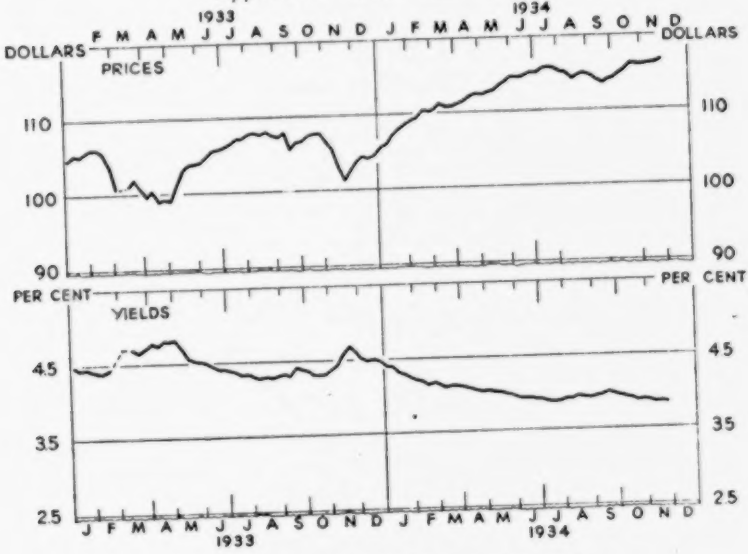
(*ii*) *The gold clause—an obstruction to the power of the Congress to regulate the value of money. See brief in No. 471 and No. 472, pp. 48–53.*

Regardless of whether the amount of the Federal obligations containing the gold clause was so large as to have made it impossible for the Government to continue the service on its debt after reduction of the gold content of the dollar, the gold clause could not be enforced in outstanding public obligations without injury to public and private debtors and creditors and to the public at large caused by treating public and private gold obligations differently. In a dollar economy, the gold content of the dollar can be increased or decreased with equal justice to debtors and creditors, provided the increase or decrease is made applicable to all alike. The moment the application is limited, relative discrepancies necessarily follow just as they followed in the dual monetary system of the post Civil War period. By providing that the monetary legislation, including the Joint Resolution, should apply equally to all obligations, relative values of the obligations remained unchanged.

104464—35——3

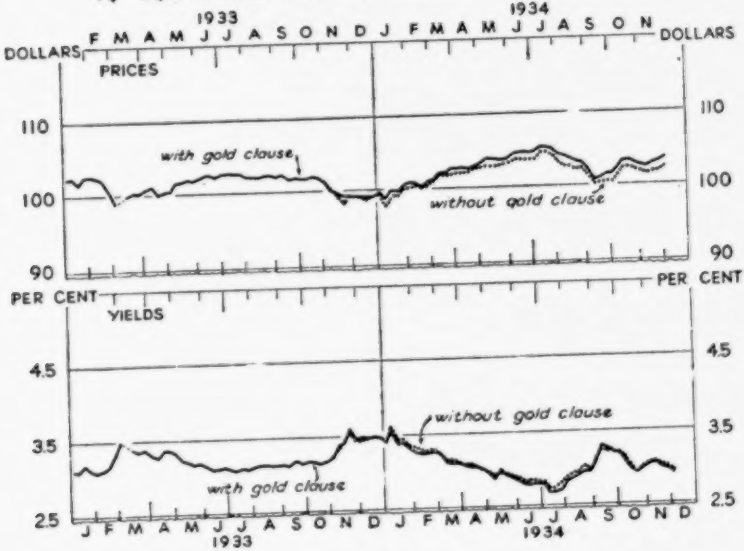
DOMESTIC CORPORATE GOLD CLAUSE BONDS

Based on Yields of Moody's 30 Aaa Bonds
Applied to 4¼%-31 Year Bond



U.S TREASURY BONDS

3⅜% Bonds 1943-47 With Gold Clause
4¼-3¼% Bonds 1943-45 Without Gold Clause



This is substantiated by the charts on the opposite page showing the market value in legal tender of Government and private gold-clause obligations over the period January 1933 to November 1934.[23]

If the gold clause had not been abrogated in Government obligations, an increasing discrepancy would have separated the prices of Government and private gold-clause obligations. Investments in private gold-clause obligations would have suffered by the flight from private obligations to Government gold-clause obligations, and investments like those of the claimant would have reaped a

---

[23]An analysis of the opposite charts leads to the conclusion that bond prices were not affected by the gold clause or by the action of the Government with respect to gold or gold clauses except as all obligations benefited by improved conditions.

The chart, prepared by the Division of Statistics and Research, United States Treasury Department, is based upon Moody's Index for thirty Aaa bonds (see Moody's Investment Weekly Survey, 1933 and 1934) and the prices for the United States Treasury bonds are based upon figures obtained from the New York Stock Exchange.

It should be stated that all of the thirty bonds used in the Moody Index, but one, contain gold clauses. The one exception is Chicago, Burlington & Quincy 4's of 1958. See chart on page 73 *infra*. Of the 29 gold-clause bonds, 27 contain gold clauses of the third type (that is, specifying the mode of payment) and 2 contain gold-value clauses.

harvest by the artificial demand created for Government bonds.[24]

While the Federal Government might have devalued the dollar and for a time maintained the service on its gold-clause obligations in gold and thereafter in an amount of money sufficient to purchase gold coin of the old standard, or its equivalent by weight, the income of the Government would necessarily have had to be increased from taxation to meet this enhanced charge. Such an increase in taxes at a time when the debt burden was already disturbing the economy of the country was to be avoided. Eventually the Government might have found itself obliged to follow the course that was pursued at the end of the Civil War, when, in order to pay its obligations in coin, greenbacks were denied legal tender quality for payment of customs duties (Act of February 25, 1862, 12 Stat. 345). Thus, to have continued payment on the public debt in gold coin of the old standard or its equivalent

---

[24] The purchasing power of the dollar expressed in terms of wholesale prices (1926 equals $1) of all commodities was in 1918 $.762; in 1933, $1.517; and for the first six months of 1934, $1.36. (The United States Department of Labor, Wholesale Prices, October 1934, Serial No. R–186, page 4.) In other words, a dollar in 1933 would purchase two times and in 1934, 1.7 times the amount that it would have purchased in 1918. If the gold clause in Government obligations were sustained and construed to entitle the holders to $1.69 on every dollar face amount of the bond, a ten thousand dollar gold-clause bond would in 1934 purchase 2.87 times as much as the $10,000 invested in such bond in 1918.

by weight after reducing the gold content of the dollar would, in effect, have led toward a return of a dual monetary system.

(*iii*) *The gold clause—an obstruction to the power of the Congress to borrow money* (*see brief in cases No. 471 and No. 472, pp. 58–62*)

The gold clause seriously interfered with the exercise of the Government's borrowing power when the Congress found it necessary to suspend gold payments and reduce the gold content of the dollar.

It can no more be contended that the Joint Resolution was made applicable to outstanding Federal obligations in order to relieve the Government of a portion of its debt than it can be contended that the dollar was devalued in order to lessen the burden of the Government's own non-gold-clause debts. The gain and loss, in terms of grains of gold, on the books of the Government was an incidental result. The measures affected the Government in every respect in which it acted in a proprietary capacity just as they affected the individual citizen.[25] It is noteworthy that the Joint Resolution explicitly provides that it applies as well to the gold-clause obligations due the United States as to those owing by the United States. Included

[25] By the reduction of the gold content of the dollar the value of the gold held in the Treasury either as free gold or as reserves or security for currency, increased in value in terms of dollars. This increase in value came as a result of the action of the Government. One of the purposes of the

among the gold-clause obligations held by the United States were some $11,000,000,000 principal amount of war debts.[26]

That the Joint Resolution was enacted in the general public interest and not in the proprietary interest of the Government is recognized by courts at The Hague (*Royal Dutch Shell Co.,* and the *Batavia Petroleum Co.,* judgments by the Hague Court, dated Feb. 15, 1934), in Vienna (*International Federal Loan of Austria* [1930, American section], 1934 Die Rechtsprechung 82), and in Copenhagen (*Soderberg* v. *Copenhagen Tel. Co.,* Superior Court for the Eastern District of Denmark, Feb. 3, 1934), which have had occasion to deal with the question whether effect should be given to the Joint Resolution in suits before them. The Hague Court said in the *Royal Dutch Shell case:* "There cannot be any question about viola-

---

Orders requisitioning gold, in addition to replenishing the reserves for the currency, was to assure that in the event of a reduction in the value of the dollar for the benefit of the country as a whole, no person or class of persons should reap a profit (by reason of the increased price of gold) that was not shared equally by all. The Federal Reserve banks, which required gold as a reserve for their currency, nevertheless recognized that any "profit" from devaluation should accrue to the United States for the benefit of the country as a whole. See remarks of Mr. Black, Governor of the Federal Reserve Board, Hearings of the Committee on Banking and Currency of the Senate on the Gold Reserve Act of 1934, page 13.

[26] See Treasury Department Statement of Securities Owned by the United States, June 1933.

tion of public order, as the measure [the Joint Resolution] has, according to its purpose set forth in the preamble, been enacted, as required by urgent necessity and public [American] interest, and not at all—here the claimant himself agrees—in order to injure the creditors." [27]

After the Act of May 12, 1933 (48 Stat. 31, 52), authorized the President to decrease by as much as fifty percent, the weight of the gold dollar, the Treasury could not issue bonds calling for payment in gold coin of the old standard without knowingly incurring a debt which might amount ultimately to twice the amount borrowed. To borrow money upon such terms would have been to favor a few investors at the expense of all the taxpayers. Nor could this dilemma be avoided by leaving the gold clause out of the new bond issues while sanctioning

[27] Quotation taken from Arthur Nussbaum, *Comparative and International Aspects of American Gold Clause Abrogation*, 44 Yale Law Journal, 53, 76. This writer, Visiting Professor of Law, Columbia University; formerly Professor of Law, Berlin University, states: "It must be appreciated, however, that the American statute requires, in a sense of fairness and at American cost, a thoroughly equal treatment of non-American debtors as well as creditors. It would have been a fairly shrewd stroke of business for the United States to exclude from the benefits of the act, according to the French doctrine, contracts involving 'international payments.' Such an exception would have brought in a profit to the United States similar to or greater than that taken by France." *Idem*, p. 78. In this quotation the author was speaking of obligations due the Government as well as private persons.

such clauses in outstanding public or private obligations, for investors, so long as it was anticipated that the President might exercise his power under the Act of May 12, 1933, would so prefer the old issues as to impose prohibitive rates upon the new. Moreover, to prohibit gold clauses in new obligations and sanction them in the old would have been to permit a revival of the dual monetary system of the middle nineteenth century. Senator Fletcher, Chairman of the Committee on Banking and Currency, which reported the Joint Resolution, stated:

> The situation cannot be met merely by enabling new obligations to be payable in legal tender without creating a difference in value between the old and the new obligations and impairing or destroying the market for new obligations. * * * It will interfere both with financing of the Government and financing of private enterprise. *We would pass two different kinds of currency if we were to attempt that.* (77 Cong. Rec., Pt. 5, 4890.) (Italics ours.)

An official Treasury statement issued May 26, 1933 (quoted in full at page 26 of the brief in cases Nos. 471 and 472), stated that the purpose of the Joint Resolution was to make it clear that all obligations, past and future, should be upon the same footing.

The Treasury statement to which reference was just made calls attention to another provision of the Joint Resolution; that is, the provision prohibiting the use of gold clauses in obligations, public or private, thereafter incurred. The Govern-

ment could not, of course, continue the use of gold clauses in its obligations after such provisions were declared by the Congress to be against public policy. Private debtors might, on the other hand, have continued to use such clauses in the hope that at some future time they would be sanctioned by the Congress; and so long as such a possibility existed, new issues of public obligations would suffer in comparison with private obligations which contained this speculative advantage.

When we consider the wide use made of Government obligations by sale and hypothecation, it is manifest that they are an important factor in the money market. It is equally clear that bonds in which the gold clause was allowed to remain would adversely affect the market available for other types of bonds and thereby impair and obstruct the borrowing power of the Government.

(iv) The gold clause—an interference with the powers of the Federal Government over international relations, foreign exchange transactions, and foreign commerce (see brief in Nos. 471 and 472, pages 62–68)

3. The Joint Resolution is within the powers of the Congress

A. Power over the coinage and currency (see brief in Nos. 471 and 472, pp. 48–53)

In the Act of May 12, 1933 (48 Stat. 31), as amended by Section 2 of the Joint Resolution of June 5, 1933 (48 Stat. 112), it is provided:

> All coins and currency of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, * * *.

There is strong basis for the belief that this provision, by itself, accomplished everything that was sought to be accomplished by section 1 of the Joint Resolution with respect to gold clauses in public and private obligations,[28] and that the power of Congress to declare all forms of money legal tender for existing and future contracts, of neces-

---

[28] A statement of the Treasury of May 26, 1933, read in part as follows:

"Recently the Thomas Amendment to the Agricultural Relief Act has made all coins and currencies of the United States legal tender for the payment of every debt, public and private. Due, however, to the language used doubt has arisen whether obligations expressed to be payable in a particular kind of money, such as gold coin, may be satisfied by payment in other forms of legal tender.

"While the Supreme Court of New York is reported to have held in a recent case that an obligation calling for payment in gold coin could be satisfied by payment of other lawful forms of money (*Irving Trust* v. *Hazlewood*, N. Y., Law J., May 25, 1933, p. 3160, col. 2), confusion may be created if the existing legislation is differently construed in other jurisdictions. One of the purposes of the resolution is to remove any doubt and to avoid confusion, so that debtors and creditors may have a clear definition of their legal position." (The Treasury statement is quoted in full at p. 26 of the brief in Nos. 471 and 472.)

sity carries with it the power exercised in Section 1 of the Joint Resolution.

When the debt under consideration in the *Legal Tender Cases* (*Parker* v. *Davis*) was incurred gold and silver coins alone were legal tender. The creditor could be presumed to have anticipated satisfaction of his debt in gold or silver coin of the existing standard with no less justification than the present creditor of a gold-clause obligation. A creditor who in 1918 lent $10,000 and accepted a non-gold-clause promissory note therefor payable in 1934 may be presumed to have anticipated satisfaction of his debt in a gold dollar of the standard fixed in 1837, no less than the purchaser of a Government bond containing a gold clause similar to that applicable to "greenbacks" (see page 24, *supra*); yet, since the decisions in the *Legal Tender Cases* and *Juilliard* v. *Greenman*, 110 U. S. 421, no serious question remains of the power of the Congress to provide that non-gold-clause debts incurred in 1918 may be discharged in currency that was not legal tender in 1918, notwithstanding that between the date the debt was incurred and the date of payment the gold content of the dollar was reduced from 25.8 to $15\frac{5}{21}$ grains of standard gold. (See 12 Wall. 457, 551, 552.) The rationale of these cases supports the conclusion that Congress likewise has the power to declare that obliga-

tions in which the gold clause is expressed may be similarly discharged.[29]

Justice Field in his dissenting opinion in the *Legal Tender Cases* recognized that to hold that Congress had the power to make United States notes legal tender for debts theretofore incurred meant that Congress had the *power* to make such notes legal tender for debts specifically stated to be payable in gold coin. Justice Field stated at page 673 as follows:

> * * * Express contracts for the payment of gold or silver have been maintained

---

[29] In the *Legal Tender Cases* the Court, in speaking about United States notes, said at page 530:

"Can such notes be constituted a legitimate circulating medium, having a defined legal value? If they can, then such notes must be available to fulfill all contracts (not expressly excepted) solvable in money, without reference to the time when the contracts were made. * * *"

And in *Juilliard* v. *Greenman*, the Court said at page 448:

"This position is fortified by the fact that Congress is vested with the exclusive exercise of the analogous power of coining money and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals."

> by this court, and specifically enforced on the ground that, upon a proper construction of the act of 1862, in connection with other acts, Congress intended to except these contracts from the operation of the legal tender provision. But the power covers all cases if it exists at all. The power to make the notes of the United States the legal equivalent to gold and silver necessarily includes the power to cancel with them specific contracts for gold as well as money contracts generally. Before the passage of the act of 1862, there was no legal money except that which consisted of metallic coins, struck or regulated by the authority of Congress. Dollars then meant, as already said, certain pieces of gold or silver, certified to be of a prescribed weight and purity by their form and impress received at the mint. The designation of dollars, in previous contracts, meant gold or silver dollars as plainly as if those metals were specifically named.

The case of *Bronson* v. *Rodes,* 7 Wall. 229, does not negative the existence of this power. That case construed the word "debts" in the Legal Tender Acts as not including obligations expressly calling for payment in coin. The Court did not decide that the Congress could not have made greenbacks legal tender for obligations expressly stipulating payment in coin. Indeed, the power of the Congress to make currency legal tender would be a

nullity if it could be avoided by such a stipulation in the contract.[30] This was confirmed by Justice Bradley in his concurring opinion in the *Legal Tender Cases*, 12 Wall. 457, 567:

> * * * I do not understand the majority of the court to decide that an act so drawn as to embrace, in terms, contracts payable in specie, would not be constitutional. Such a decision would completely nullify the power claimed for the government. For it would be very easy, by the use of one or two additional words, to make all contracts payable in specie.

Before the Court had construed the word "debts" as used in the Legal Tender Acts not to include agreements to pay coin, the courts of last resort of at least five States, construing the Legal Tender Acts to include coin or specie obligations,

---

[30] "The substantial effect of the *Legal Tender* decisions was to hold that Congress could provide that something other than gold and silver coin should be made a legal tender in payment of debts * * *. If the gold clause were allowed to be controlling, however, the *Legal Tender* decisions would be a dead letter. They would merely be a case of 'law in books'; the law in action would be that everyone who was smart enough to stipulate for gold expressly would be entitled to exact payment in gold or the equivalent in exchange value as determined by private markets and the bargaining of speculators, quite irrespective of what the policy of Congress in relation to the currency, adopted in solemn legislative form for the benefit of the whole people, might be." (Charles S. Collier, *Gold Contracts and Legislative Power*, 2 The George Washington Law Review 303, 309.)

upheld, or assumed, the constitutionality of the Acts as so construed.[31]

If, in order to assure uniformity and parity of value to the various forms of coin and currency of the United States, the Congress has the power to tax an issue of State bank notes for the purpose of driving them out of circulation (*Veazie Bank* v. *Fenno,* 8 Wall. 533), to tax banks which paid out as currency notes of any town, city, or municipal corporation (*National Bank* v. *United States,* 101 U. S. 1), to reduce or increase the content of gold and silver coins (4 Stat. 699; 5 Stat. 136; *Legal Tender Cases,* 12 Wall. 457, 551), to regulate the value of dollars in terms of foreign money (1 Stat. 41; 5 Stat. 496; 17 Stat. 602; *The Collector* v. *Richards,* 23 Wall. 246), and to prohibit the export of coin in order to counteract the effect of the fluctuation in the market value of gold and silver (*Ling Su Fan* v. *United States,* 218 U. S. 302), then the Congress has no less authority to declare against public policy and to prohibit the use in public as well as private obligations of provisions which are not only inconsistent with, but destructive of, the uniformity and parity of different kinds of coin and currency of the United States.

If the gold clause were sustained, it would have the effect of continuing the existence of the prior

---

[31] *Warnibold* v. *Schlichting,* 16 Ia. 243; *Buchegger* v. *Shultz,* 13 Mich. 420; *Schollenberger* v. *Brinton,* 52 Pa. St. 9; *Woods* v. *Bullens* (Mass.) 6 Allen 516; *Rodes* v. *Bronson,* 34 N. Y. 649; Cf. *Bronson* v. *Rodes,* 7 Wall. 229, 258.

gold coins as a measure of determining the amount of an obligation despite the action of the Congress in abolishing such gold coins. Just as the Congress has the power to drive out of circulation competing coins and currencies created by the States, in order to regulate the value of money and maintain the uniform value of all coins and currencies of the United States, so must it have the power to abolish coins and currencies adopted by persons as a means of payment and similarly to abolish coins and currencies previously issued by the United States. (Cf. *Veazie Bank* v. *Fenno,* 8 Wall. 533, 549, and *National Bank* v. *United States,* 101 U. S. 1, 6.)

The power exercised by the Congress in the Joint Resolution is analogous to the power exercised in requiring the delivery of gold coin, gold bullion, and gold certificates [32] (Act of March 9, 1933, 48 Stat. 1, and Executive Orders and Orders of the Secretary of the Treasury issued thereunder), and in making currency of the United States theretofore redeemable in gold coin [33] now redeemable in lawful money or in gold bullion only to the extent per-

[32] The claimant seems to recognize the validity of the Acts, Orders and Regulations requisitioning gold. See pages 16, 34 and 35 of his brief.

[33] The United States agreed to redeem its gold certificates in gold coin (U. S. Code, Title 31, Sections 428 and 429); its United States notes and Treasury Notes of 1890 in gold coin of the standard fixed by the Act of March 14, 1900 (U. S. Code, Title 31, Section 408), and to redeem Federal Reserve notes in gold (Federal Reserve Act, Section 16, 38 Stat. 251).

mitted in regulations issued by the Secretary of the Treasury (Gold Reserve Act of 1934, c. 6, 48 Stat. 337, 340, Sections 2, 5 and 6). If the Congress had the power to require the delivery of gold coin against payment of currency which was legal tender for an equal amount, it would be strange indeed if it did not have the power to accomplish the same result by directing in the first instance the payment of an equal face amount of legal tender for United States gold-clause bonds. Similarly, if the Congress had the power to provide that gold certificates and United States notes should no longer be redeemed in gold coin of the old value, it would seem strange to deny to the Congress the power to redeem Government interest-bearing obligations with a dollar having a lesser gold content. There would appear to be no basis for distinguishing between the owner of gold or currency immediately payable in gold, and the owner of a contractual claim payable in the future in gold coin or its equivalent.

B. Power to borrow money (see brief in Nos. 471 and 472, pp. 58–62)

The borrowing power is referred to in the *Legal Tender Cases,* 12 Wall. 457, 556–560, as supporting the power of the Congress to issue the "greenbacks" and make them legal tender for all debts. As has just been stated (page 37), to concede to the Congress authority to discharge a non-gold clause debt, incurred when only gold and silver coin were legal tender, in currency notes for the redemption

of which the Government assumed no immediate obligation, and to deny to the Congress authority to redeem its gold clause obligations in currency, legal tender for a like amount and in fact accepted for the same amount, would be strange indeed.

C. Power over foreign and domestic commerce and international relations (see brief in No. 471 and No. 472, pp. 77–82)

The Congress reasonably believed that a means of regulating commerce between the States and with foreign nations was to requisition gold, prohibit its hoarding or export, suspend redemption of currency in gold, restrict foreign exchange transactions, place our monetary system upon a gold bullion basis and reduce the gold content of the dollar. The Congress could not have carried out this monetary program effectively unless it abrogated the gold clause in outstanding public and private obligations.

There does not appear to be any serious doubt as to the power of the Congress to pass a law prohibiting gold clauses in future obligations. Cf. *Hepburn* v. *Griswold,* 8 Wall. 603, 615. The constitutionality of such an act rests upon its reasonable relation to the powers of the Congress to regulate the value of money, to borrow money, and to regulate commerce, as well as upon the sovereign powers over coinage and currency. But no distinction can be drawn in this respect between outstanding and future obligations. As has been shown, the continued validity of gold clauses

in outstanding obligations would have constituted as effective a restriction on the constitutional powers of the Congress as would the use of such gold clauses in new obligations. Accordingly, the abrogation of gold clauses in obligations heretofore incurred is as reasonably related to these powers of the Congress as the abrogation of gold clauses in future obligations.

The only question that remains is whether there is any constitutional limitation which prevents the Congress from exercising this power in respect to outstanding obligations.[34]

---

[34] In *Louisville & Nashville Railroad Company* v. *Mottley*, 219 U. S. 467, this Court said at pages 485 and 486:

"We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived."

The Court in the *Legal Tender Cases* stated at page 530:

"* * * And there is no well-founded distinction to be made between the constitutional validity of an act of Congress declaring treasury notes a legal tender for the payment of debts contracted after its passage and that of an act making them a legal tender for the discharge of all debts, as well those incurred before as those made after its enactment. There may be a difference in the effects produced by the acts, and in the hardship of their operation,

4. No constitutional limitations are infringed by the Joint Resolution

A. The Joint Resolution does not violate the due-process clause of the Fifth Amendment

The claimant contends that the Joint Resolution is "unconstitutional and void as a violation of the Fifth Amendment to the Constitution" on the familiar ground that it is "unreasonable, arbitrary, and capricious" (Page 31).

It appears from the heading which the claimant gives to his argument (Point Two C, page 31) that he apparently relies upon an asserted violation of the due-process clause of the Fifth Amendment. The due-process clause prohibits a deprivation of property without due process of law. As will be shown, *infra* (pages 68 to 70), the claimant confuses the due-process and the just-compensation clauses of the Fifth Amendment. He apparently forgets that he has filed his suit in the Court of Claims under section 145 of the Judicial Code and that the Court of Claims is without jurisdiction of any claim based merely upon a de-

---

but in both cases the fundamental question, that which tests the validity of the legislation, is, can Congress constitutionally give to treasury notes the character and qualities of money? Can such notes be constituted a legitimate circulating medium, having a defined legal value? If they can, then such notes must be available to fulfill all contracts (not expressly excepted) solvable in money, without reference to the time when the contracts were made. * * *"

struction of property. Unless there is an actual *taking* of property, with or without due process, no contract implied in fact would arise upon which liability on the part of the Government could be predicated. The claimant must rely upon the theory of his case as framed by the petition, and that is one for a breach of an express contract. However, even assuming that the present action were a case or controversy in which the claimant could properly invoke the due-process clause, the defendant contends that the claimant has not been deprived of private property without due process of law.

To substantiate his charge that the Joint Resolution is unreasonable "the claimant contends that the Joint Resolution * * * cannot be considered to be a regulation of the value of money" and "will not accomplish, or have a reasonable relation to, any proper legislative object."

The title, the purpose, and the effect of the Joint Resolution, "To assure a uniform value to the coins and currencies of the United States", are mistaken by the claimant (see pages 32 et seq. of his brief). He admits that Section 2 of the Joint Resolution, making all coins and currencies legal tender for debts of every kind, is reasonably adapted to assure uniform value to the coins and currencies of the United States, but misconstrues the first section as an attempt to make all obligations of the United States uniform. If the reading of the Joint Resolution itself is not sufficient, a

reference to its history will show that Section 1 is no more than the converse of Section 2.

The Congress expressed its intention that all money should be legal tender for all obligations—gold clause and non-gold clause equally—to avoid the possibility that these provisions might be construed as were the provisions of the Legal Tender Acts in the case of *Bronson* v. *Rodes*, 7. Wall. 229.[35]

The claimant admits that the Government has the power to declare what shall constitute legal tender and to pay the claimant's bond in such legal tender currency (pages 15, 16, 33). He asserts that the only issue presented in the case is "as to the amount of legal tender currency required to satisfy the claimant's bond" (page 16). And on page 35 he contends that because the Joint Resolution "purported simultaneously to standardize the unit of currency in terms of dollar, gold dollar, and gold-value obligations" the Resolution is therefore "unreasonable, arbitrary, and capricious."

At pages 36 and 37 of his brief the claimant contends that on June 5, 1933, gold-value obligations were at a premium in terms of the coins and currencies of the United States in circulation at that time. If he fails to prove this, his entire argument falls.

The claimant's only citation in support of his contention that there was such a disparity in value

---

[35] Cf. Treasury Statement of May 26, 1933, printed in full at page 26 of the brief in Nos. 471 and 472.

is the index of wholesale commodity prices contained in the Annalist Weekly of December 14, 1934, at page 817, and reproduced in Appendix, page XIV, of claimant's brief.

The value of the "old gold dollar" as used in said Index is "based on exchange quotations for France, Switzerland, Holland, and Belgium." In other words, the only disparity in value that the Annalist Weekly could find between the "old gold dollar" and other currency of the United States existed in the foreign exchange market abroad. That the "old gold dollar" and other coins and currency in the United States were not at a parity in value in the foreign exchange market abroad is irrelevant, since the Executive Orders effectively prevented the claimant and those similarly situated from exporting gold or otherwise realizing on any increased value of gold in terms of United States dollars in the foreign markets (*Ling Su Fan* v. *United States*, 218 U. S. 502).

We believe we have shown on pages 74 and 75 of this brief and pages 101 to 114, 131, and 132 of the brief in cases Nos. 471 and 472 that on June 5, 1933, there was no disparity in value in the United States between the gold dollar and other coins and currency of the United States. That being true, claimant's argument fails.

Moreover, it should be pointed out that the claimant's argument is in effect the argument made and rejected in the *Legal Tender Cases*. If the Gov-

ernment has the power to declare what shall be legal tender for contracts solvable in money, it is immaterial that there may be a difference between the intrinsic value of the specific coin or currency stipulated in the contract and other legal-tender coin or currency. Cf. dissenting opinion of Justice Field, 12 Wall. 457, 673.

The claimant's brief also mistakes the relation of the Joint Resolution to the monetary and other powers of the Congress. Like the legislation sustained in the *Veazie Bank* case,[36] it is a measure to assure the effectiveness of the direct exercise of these powers in other legislation such as the prior Act of May 12, 1933, and the subsequent Gold Reserve Act of 1934. The reasonableness of the Joint Resolution and the appropriateness of its provisions, when seen in this, its true light, are demonstrated in pages 18 to 68 of the brief in cases No. 471 and No. 472.

(i) The Legal Tender Cases are conclusive that Sections 1 and 2 of the Joint Resolution do not violate the Fifth Amendment.

It is not necessary to reason from analogy to sustain the Resolution against the contention that it violates the Fifth Amendment. This Court in effect determined that such an exercise of the legis-

---

[36] *Veazie Bank* v. *Fenno*, 8 Wall. 533; see also *National Bank* v. *United States*, 101 U. S. 1; *Ling Su Fan* v. *United States*, 218 U. S. 302. See brief, in cases No. 471 and No. 472, pages 18, 44, 45, 74, 75.

lative powers was valid when it decided the *Legal Tender Cases.*

As gold and silver coin alone were legal tender before the Legal Tender Acts were passed, every dollar obligation carried an implied coin clause. In deciding that obligations of this character were satisfied upon payment, dollar for dollar, in irredeemable greenbacks, the Court passed upon legislation in principle no different from the Joint Resolution; and in deciding that such legislation was a reasonable exercise of the constitutional monetary and other powers and did not constitute a taking of private property in violation of the Fifth Amendment, the Court upheld legislation having the same purpose and effect as the Joint Resolution. Nor can it be said that this Court did not advert in the *Legal Tender Cases* to the consequences of its ruling in the event of a reduction in the metallic content of the dollar. In sustaining the Legal Tender Acts the Court drew an analogy from the situation which existed when the Congress did in fact reduce the gold content of the dollar and made the new money of lesser weight legal tender, dollar for dollar, for debts incurred with reference to the old money of greater weight.

The Court said at pages 551–2:

> Closely allied to the objection we have just been considering is the argument pressed upon us that the legal tender acts were prohibited by the spirit of the fifth amendment,

which forbids taking private property for public use without just compensation or due process of law.

* * * * *

* * * By the act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted, and about six percent was taken from the weight of each dollar. The effect of this was that all creditors were subjected to a corresponding loss. The debts then due became solvable with six percent less gold than was required to pay them before. The result was thus precisely what it is contended the legal tender acts worked. But was it ever imagined this was taking private property without compensation or without due process of law? Was the idea ever advanced that the new regulation of gold coin was against the spirit of the fifth amendment? And has any one in good faith avowed his belief that even a law debasing the current coin, by increasing the alloy, would be taking private property? It might be impolitic and unjust, but could its constitutionality be doubted? Other statutes have, from time to time, reduced the quantity of silver in silver coin without any question of their constitutionality. It is said, however, now, that the act of 1834 only brought the legal value of gold coin more nearly into correspondence with its actual value in the market, or its relative value to silver. But we do not perceive that this varies the case or diminishes its force as an

> illustration. The creditor who had a thousand dollars due him on the 31st day of July, 1834 (the day before the act took effect), was entitled to a thousand dollars of coined gold of the weight and fineness of the then existing coinage. The day after, he was entitled only to a sum six percent less in weight and in market value, or to a smaller number of silver dollars. Yet he would have been a bold man who had asserted that, because of this, the obligation of the contract was impaired, or that private property was taken without compensation or without due process of law. * * *[37]

It will be recalled that Mr. Justice Field, in the *Legal Tender Cases*, dissented from the opinion of the majority on the ground that the Legal Tender Acts did violate the Fifth Amendment. He recognized, however, that, if the Legal Tender Acts as construed by the Court did not violate the Fifth Amendment, it would not be violated by a legal tender act which like the Joint Resolution, leaves no ground for the construction that it does not apply to gold-clause obligations (12 Wall. 457, 673).

While the *Legal Tender Cases* involved controversies between private debtors and creditors, the decision was understood by the Court, and has since been understood, to sustain the constitutionality of

[37] See also the concurring opinion of Bradley, J., at pages 555–6.

the Legal Tender Acts as applied to public, as well as private debts. The order of the Court reopening the question of the validity of the Legal Tender Acts was made sufficiently broad to include public debts,[38] and the majority opinion was equally comprehensive.[39] The dissenting opinion of Mr. Justice Field specifically states (at page 635) that the "questions intended for argument, and actually argued and decided, relate—1st, to the validity of that provision of the act which declares that these notes shall be a legal tender in payment of debts, as applied to private debts and debts of the government contracted previous to the passage of the act; and, 2nd, to the validity of the provision as applied to similar contracts subsequently made."

---

[38] When the *Legal Tender Cases* came up to the Supreme Court for consideration, the Court made the following order:

"That Mr. Potter and the Attorney-General be heard in these cases upon the following questions:

"1. Is the act of Congress known as the legal tender act constitutional as to contracts made before its passage?

"2. Is it valid as applicable to transactions since its passage?"

Mr. Justice Strong, writing for the Court, states the following at the beginning of his opinion (page 529):

"The controlling questions in these cases are the following: Are the Acts of Congress, known as the legal tender acts, constitutional when applied to contracts made before their passage; and, secondly, are they valid as applicable to debts contracted since their enactment?"

[39] See pages 530, 539, and 540. See also *Savage's Case*, 8 Ct. Cl. 545 (1872); affd. 92 U. S. 382 (1875) on grounds not material here.

(ii) *Aside from the Legal Tender Cases, the decisions of this Court upon the exercise by the Congress and by the legislatures of the various States of powers other than the monetary powers sustain the proposition that the Joint Resolution does not constitute a deprivation of property without due process of law.*

Public, as well as private, obligations may be affected as a result of action taken within the Federal police power or some other paramount power. *Lynch* v. *United States*, 292 U. S. 571, 579.[40]

The contractual rights of creditors and duties of debtors are the rights and duties recognized and enforced by the law. "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order * * *" (*Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, 435). This is no less true in a case where one of the parties to the contract may, in its governmental capacity, exercise the reserved sovereign power. *Horowitz* v. *United States*, 267 U. S. 458.

---

[40] It is noteworthy that the cases cited by the Court to sustain the proposition that the due-process clause prohibited the United States from annulling the policies of War Risk Insurance "unless, indeed, the action taken falls within the federal police power or some other paramount power" are cases involving private contracts or property rights, affected by State as well as Federal legislation.

There is no deprivation of property within the meaning of the 5th or 14th Amendments when a contract with the Government is affected by a statute enacted in the exercise of a paramount power. The cases which have upheld such action by the State legislatures, as applied to state obligations,[41] go far to establish the propriety of similar action by the Congress, particularly as the Congress is not restrained by the more specific

---

[41] In the exercise of the police power the States have been permitted:
(1) to compel railroads to conform their tracks to street grades, and to build and repair viaducts over tracks, although the railroad charters when originally granted or other contracts between the State and the railroad did not require the performance of these acts: *Atlantic Coast Line Railroad Company* v. *Goldsboro*, 232 U. S. 548; *C. B. & Q. R. R. Co.* v. *Nebraska*, 170 U. S. 57;
(2) to invalidate the charter of a lottery company, although that company had paid substantial consideration therefor; *Stone* v. *Mississippi*, 101 U. S. 814; and
(3) to pass legislation which had as its effect the termination prior to maturity of an exclusive grant to a company to maintain slaughter houses in New Orleans; *Butchers Union Company* v. *Crescent City*, 111 U. S. 746.

This Court has held "that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety", sustaining State legislation enacted for such a purpose, notwithstanding its effect upon property rights. *C. B. & Q. R. R. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 592. In this case the Court upheld a statute under which the Commissioners required the Railroad Company to remove a bridge and a culvert which constituted an obstruction to a proposed drainage project. See also *Chicago and Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67.

limitations of an impairment-of-contract clause. See brief in cases No. 471 and No. 472, page 91.

The Court has very recently stated in *Home Building & Loan Ass'n* v. *Blaisdell, supra* (p. 437), that:

> The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.

Not only has this Court held that State legislation may affect contracts to which the State is a party, notwithstanding a failure to reserve the right to legislate with respect to the contract (*Chicago and Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67), but decisions of this Court have established a principle that legislative powers cannot be expressly contracted away. In *Newton* v. *Commissioners*, 100 U. S. 548, and *Illinois Central Railway* v. *Illinois*, 146 U. S. 387,[42] the Court

[42] Other cases sustaining State Statutes revoking prior legislative attempts to bargain away authority entrusted to the legislatures are collected in *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, 436.

See also *Denver & R. G. R. R. Co.* v. *Denver*, 250 U. S. 241; *Stone* v. *Mississippi*, 101 U. S. 814; *N. Y. & N. E. Railroad Co.* v. *Bristol*, 151 U. S. 556; *Boyd* v. *Alabama*, 94 U. S. 645; *Straus* v. *American Publishers' Ass'n*, 231 U. S. 222. 243; *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451, 463; *North American Co.* v. *United States*, 171 U. S. 110, 137.

James Parker Hall, in *American Law and Procedure*, Volume XII, *Constitutional Law*, pages 242, 243, states as follows:

"From these decisions and dicta it appears that the subjects concerning which a state may not irrevocably contract

sustained subsequent legislation having the effect of abrogating rights conferred by earlier legislation. In the *Newton* case the legislature had entered into an agreement to establish the county seat in a community, conditioned upon the performance of certain acts by that community. After these acts were performed, legislation was enacted providing for the removal of the county seat. In upholding that statute this Court declared at page 559:[43]

> They involve *public interests,* and legislative acts concerning them are necessarily *public laws.* Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of

---

away its governmental powers are considerably more extensive than the public health, morals, and safety. Probably the doctrine is or will come to be that no state may make an irrevocable contract substantially impairing its governmental powers in respect to any matter seriously affecting the public welfare."

[43] In the *Illinois case* the Court sustained legislation revoking a prior grant to the Illinois Central Railway of ownership of submerged lands in the harbor of Chicago. In the course of its opinion the Court stated at page 460:

"* * * The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it. * * *"

> enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.

There has been similar recognition that the Congress does not violate the due process clause of the Fifth Amendment by legislation reasonably calculated to achieve the objects entrusted to it even though directly or incidentally affecting public as well as private contract rights.[44] See also cases cited on pages 92 to 96 of the brief in cases No. 471 and No. 472. The principles applied by this Court to State legislation affecting public as well as private obligations have been applied equally to Federal legislation. One Congress can no more convey or contract away the legislative powers intrusted by the Constitution so as to restrict the exercise of those powers by a subsequent Congress than can a State legislature.[45]

---

[44] See *Northern Pac. Ry. Co.* v. *Duluth*, 208 U. S. 583; *Calhoun* v. *Massie*, 253 U. S. 170; *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453 (1905); *C., B. & Q. R. R. Co.* v. *Drainage Commissioners*, 200 U. S. 561 (1906); *C. & A. R. R. Co.* v. *Tranbarger*, 238 U. S. 67; *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, 437; *Chicago, Burlington & c R'd* v. *Chicago*, 166 U. S. 226, 255; *The Legal Tender Cases*, 12 Wall. 457, 551, 552.

[45] See *Lynch* v. *United States*, 292 U. S. 571, 579; *North American Co.* v. *United States*, 171 U. S. 110, 137; *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451, 463.

To summarize, it is submitted that the Joint Resolution as applied to the claimant's bond does not violate the Fifth Amendment because:

(1) The *Legal Tender Cases* are a precedent directly in point;

(2) A statute which is a valid exercise of a paramount power of Congress does not violate the due-process clause of the Fifth Amendment even though the legislation may abrogate or impair rights arising under a contract with the Government. And as a corollary, since earlier Congresses could not validly restrict the 73rd Congress from exercising its constitutional powers to regulate the value of money, borrow money, or regulate foreign and interstate commerce, the gold clause in Government bonds may be abrogated by the 73d Congress when it concludes that the continued validity of such gold clauses will impair and restrict the exercise of such powers.

From the point of view of justice and equity, claimant is receiving for his bond all that he is entitled to receive from the Government. The purchasing power of the dollar on June 5, 1933, and on April 15, 1934, when claimant's bond was called, and at the present time is far greater than the purchasing power of the dollar that the Government received when it issued the Liberty bonds. (See the chart taken from The Annalist of December 14, 1934, reprinted in Appendix A, p. 92.)

When claimant demands $16,931.25 for his $10,000 Liberty bond, he is not asking the Government to

pay him what the Government actually received for the bond. He is not asking for payment of an equivalent amount; he is asking for a windfall. He is asking for more than was given to the person owning gold coin, gold bullion, and gold certificates. He is asking to be treated differently from all those persons who hold coin and currency that the Government agreed to redeem in gold at the old standard of value and which are not being so redeemed. He is asking to be treated differently from the owners of Government gold-clause obligations which matured prior to the reduction of the gold content of the dollar.[46]

B. The Joint Resolution does not violate Section 4 of the Fourteenth Amendment

The claimant contends that the Joint Resolution is "a direct violation of Section 4 of the Fourteenth Amendment." (Brief, page 17.) This section reads as follows:

> The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State

[46] By January 31, 1934, the outstanding Government gold-clause obligations were about $4,000,000,000 less than were outstanding on May 31, 1933. (Figures obtained from the United States Treasury Preliminary Statement of the Public Debt, January 31, 1934.)

> shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claims for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

It seems evident that the Joint Resolution does not violate the foregoing section. That there has been no questioning of the validity of the public debt is a conclusion that inevitably follows even upon slight consideration of the meaning attached to the words "validity" and "debt", as used in the Fourteenth Amendment.

The Joint Resolution does not question the validity of the Government's indebtedness to the claimant. The word "validity" refers to the essential existence of the obligation. That the word was so used in the Amendment is shown by its use in Section 4 in contrast to the phrase "illegal and void." It was said to have been feared by the party in power when this Section was recommended to the States that the national debt incurred during the Civil War might on some future occasion be dealt with as the second sentence of the section dealt with the debt incurred by the Confederate States.

The legislative history of Section 4 likewise supports the view that the Congress intended the phrase to refer to a complete repudiation of the

public debt.[47] The first proposal of the historically famous Joint Committee on Reconstruction was that "Neither the United States nor any state shall assume or pay any debt or obligation already incurred or which may hereafter be incurred in aid of insurrection * * *." The proposed amendment made no reference to the Federal debt until Senator Wade offered an amendment adding "The public debt of the United States, including all debts or obligations which have been or may hereafter be incurred in suppressing insurrection or in carrying on war in defense of the Union * * * shall be inviolable." In support of this, Senator Wade said: "* * * my amendment prohibits and renders null and void all obligations incurred in rebellion * * * but then my amendment goes to another branch of this business almost as essential as that. It puts the debt incurred in the Civil War on our part under the guardianship of the Constitution of the United States so that a Congress cannot repudiate it.

It has been shown at pages 35, 36, and 50–55 that the Joint Resolution involves the same principles as the Legal Tender Acts. It "questions" the "validity" of the public debt no more and no less than

---

[47] A brief legislative history of section 4 of the Fourteenth Amendment with citation of the sources is set out in the Appendix A (*infra*, page 85 to 92). See also the article cited by claimant: "A Forgotten Section of the Fourteenth Amendment", by Phanor J. Eder, 19 Cornell Law Quarterly 1 (1933).

those Acts did. The principal of some of the public debt not expressly payable in coin became payable, by the Legal Tender Acts, in greenbacks alternatively with coin. Yet nowhere in the *Legal Tender Cases, Hepburn* v. *Griswold, Juilliard* v. *Greenman, Bronson* v. *Rodes, Trebilcock* v. *Wilson, Butler* v. *Horwitz* or in any of the other cases involving the validity or the interpretation of the Legal Tender Acts as applied to public or private obligations is any reference whatsoever made to section 4 of the Fourteenth Amendment although it was adopted contemporaneously with or only a comparatively short time prior to the argument and consideration of the cases.[48]

The absence of any reference to Section 4 of the Fourteenth Amendment in any case involving the question of the constitutionality or interpretation of the Legal Tender Acts tends to indicate the fact that no one considered that the validity of a debt was questioned by changing the medium of payment.[49]

---

[48] It may be true that section 4 of the Fourteenth Amendment would not have the effect of invalidating legislation theretofore enacted. Nevertheless, if it had been thought that the Legal Tender Acts questioned the validity of the public debt, some reference by way of dictum or otherwise, would surely have been made to a provision of the Constitution so recently enacted.

[49] The claimant misconceives the purpose of the Act of March 18, 1869 (16 Stat. 1). That Act was not a legislative interpretation of Section 4 of the Fourteenth Amend-

The word "debt" as used in Section 4 of the Fourteenth Amendment is not to be construed as including every provision contained in or made with respect to an obligation of the United States. The gold clause, whether construed to prescribe the

---

ment. The 1869 Act was passed not because anyone doubted the validity of the public debt of the United States but because a dispute had arisen as to whether the principal of Federal obligations was payable in coin or in United States notes. One group contended that the obligation was to pay coin so long as the bonds did not specifically state that they were to be payable in lawful money; and the other group contended that the obligations were to be payable in greenbacks unless the obligations expressly provided that they were to be payable in coin. See Dewey, *Financial History of the United States* (11th Ed.), Section 148. The Act of 1869 fixed the obligation of the United States as one to make payment of certain obligations in coin or its equivalent unless the obligation expressly permitted payment in lawful money.

Moreover, it will be remembered that the Act of 1869 was passed at a time when the dual monetary system existed and when there was a disparity in value between the coin and the paper dollar. If the Congress had reduced the content of coins after the passage of the Act of 1869, there is nothing in that Act which would have precluded the Congress from paying coin obligations in these new coins. The court in the *Legal Tender Cases* (12 Wall. 457, 551) recognized that payment of coin obligations in coins, the content of which had been reduced after the obligation was incurred, did not constitute an impairment of the contract or a violation of the Fifth Amendment. If that is so, payment of such coins certainly would not constitute a questioning of the validity of a debt.

Similarly, if after the content of the coins was reduced, such coins were equal in value to an equal face amount of

mode or measure of payment, is a provision aside from the basic "debt."[50]

The "obligation" may include many collateral engagements including the gold clause, but the "sum of money due" is the debt. The public debt is the money borrowed on the credit of the United States; indeed, the Constitutional authority to in-

---

other currency, there is nothing in the Act of 1869 which would limit the right of the Congress to pay paper money for obligations in lieu of an equal face amount of such coins.

On June 5, 1933, all the coins and currencies of the United States were at a parity of value with each other and consequently the equivalent of each other. The Act of 1869 is without significance in a monetary system where coin and paper money are maintained at a parity of value.

It should also be pointed out that no reference was made to Section 4 of the Fourteenth Amendment, during the course of the Congressional debate on the Act of 1869, except one statement by Senator Sprague which has no significance in the case at bar. See The Cong. Globe, March 15, 1869, pages 64, 66. Nor is there anything in Dewey's *Financial History of the United States* (11th Ed.) Section 148, which indicates any relationship whatever between the Act of 1869 and Section 4 of the 14th Amendment.

[50] It is interesting to note that "debts" was construed by this Court (at the time of the passage of the Fourteenth Amendment) as used in the Legal Tender Acts not to embrace the whole of the obligation stipulating for payment of the debt in coin. *Bronson* v. *Rodes*, 7 Wall. 229; *Butler* v. *Horwitz*, 7 Wall. 258; *Dewing* v. *Sears*, 11 Wall. 379. See also *Maryland* v. *R. R. Co.*, 22 Wall. 105, 108, in which this court distinguished between the debt, i. e., the promise to pay, and the additional stipulation as to the medium of payment.

cur the public debt is "to borrow money on the credit of the United States." Legislation enacted in the exercise of another paramount Congressional power "to coin money and regulate the value thereof" may affect or even question the validity of collateral agreements without in any sense questioning the validity of the public debt itself.[51]

Whatever construction may be given to the words "validity" and "debt", it can scarcely be contended that the limitation placed upon Congress by Section 4 of the Fourteenth Amendment is more stringent than the limitation placed upon the States in the impairment-of-contracts clause. Reference has been made above to the decisions of this Court permitting State legislatures to affect contracts in the course of the exercise of a police or other paramount power notwithstanding its effect upon contracts. (See pages 55 to 61, *supra.*) In the same way the restrictions of Section 4 of the Fourteenth Amendment are to be understood not

---

[51] Historians who have considered Section 4 limits its concept of public debt to that public debt existing at the time of the adoption of the amendment. (Burdick, *The Law of the American Constitution*, Section 228; Dunning, *Essays on the Civil War and Reconstruction* (1931), 118; Eriksson & Rowe, *American Constitutional History* (1933), 301; Flack, *The Adoption of the Fourteenth Amendment* (1908), 133; Magruder, *The Constitution* (1933), 328; Story, *Constitution*, 5th Ed., Section 1965; Watson, *The Constitution of the United States* (1910), 1657; 2 Blaine, "*Twenty Years of Congress*", 190; Guthrie, *The Fourteenth Amendment* (1898), 17. See also 44 Yale Law Journal 53, 85.)

to prevent the appropriate exercise of the paramount powers of the Congress.

5. The Joint Resolution may not be attacked as a taking of private property without just compensation

The claimant states at page 42 of his brief:

> Even if the Joint Resolution of June 5, 1933, insofar as it required generally the discharge of gold or gold-value obligations in legal tender currency, should be held to be a valid exercise of delegated power, the *direct* repudiation by it therein of claimant's existing contract with defendant constitutes a "taking" of claimant's property thereunder, which, even under the exercise of a paramount power, implies an agreement in fact to pay just compensation therefor, protected by the Fifth Amendment.

This Court has repeatedly held that neither the Federal nor a State Government need make compensation to the contracting party for a deprivation or taking of property as the consequence of a legislative act which constitutes a valid exercise of Federal or State paramount power. (See cases cited *supra*, page 59.)

While the claimant's petition frames his cause of action as one for breach of an express contract, he avers as a conclusion of law that the effect of the Joint Resolution is to deprive him of his property without due process of law. In his brief, page 42, he argues that the Joint Resolution has no substantial relation to the exercise of any Congres-

sional power and therefore its effect is to deprive him of his property without due process. Point 3, page 42, of his brief charges that the Joint Resolution constitutes a repudiation of the Government's contract and thus, in his view, amounts to a taking of his property without the payment of just compensation.

It has already been remarked that the claimant confuses the due process and the just compensation clauses of the Fifth Amendment. We believe that since the only case presented in the record is for an alleged breach of an express contract, the claimant will not be heard to urge that he has not received just compensation for any taking of his property. There is no basis in fact for the argument that there has been a taking of the claimant's private property, from which an agreement to pay compensation implied either in law or in fact could arise. We have already pointed out that the due process clause is inapplicable, because a deprivation of property cannot give rise to a contract implied in fact. The Court of Claims has jurisdiction only of contracts implied in fact and not of those implied in law. (*United States* v. *Minnesota Investment Co.*, 271 U. S. 212.)

The claimant's reasoning in support of his contention that his property has been taken, involves a *non sequitur*. He argues that his private property has been taken, and that he is entitled to just compensation, in view of the provisions of the Fifth Amendment. He then asserts that the com-

pensation must be measured as of April 15, 1934, when his bond was called for payment. (See Claimant's Brief, p. 16.) That conclusion is clearly fallacious. Even on the claimant's theory, his bond was not taken. He still has his bond and may collect its face amount at any time that he chooses to accept it. If anything was taken, it was the intangible right to receive gold coin in preference to other currency. The taking, if it may be construed as such, was accomplished by the Joint Resolution. Therefore, the taking was not on April 15, 1934, but on June 5, 1933. Consequently, the value of the private property taken must be ascertained as of June 5, 1933. What then was this intangible right worth on that date? Clearly, it had absolutely no value, for the bond was worth just as much with that right withdrawn or abrogated as it was worth when that provision still formed a part of the obligation. This is conclusively demonstrated by the fact that there was no drop in the market price of the bond upon the passage of the resolution. The bond continued to be worth just as much on June 6th and immediately thereafter as it had been worth on June 4th. These facts are convincingly shown by the table on page 71.

The claimant makes no allegation that his bonds depreciated in value either on June 5, 1933, or since that time. The conclusion is inescapable that even on the theory of a taking, the property taken was

an intangible right which had no value, and consequently no compensation is due therefor.

Fourth Liberty Loan—4¼-percent bond, Series of 1933–38—daily closing prices, New York Stock Exchange

[In terms of 32nds]

[Claimant's bond was one of this series]

1933:	
May 15	102–28
16	102–28
17	102–28
18	102–28
19	102–29
20	103
22	103– 2
23	103– 4
24	103– 5
25	103– 4
26	103– 5
27	103– 4
29	103– 5
30	
31	103– 2
June 1	103– 2
2	103– 3
3	103
5	103– 2
6	103– 1
7	103
8	103
9	103
10	102–30
12	102–31
13	103– 1
14	103– 1
15	103– 2

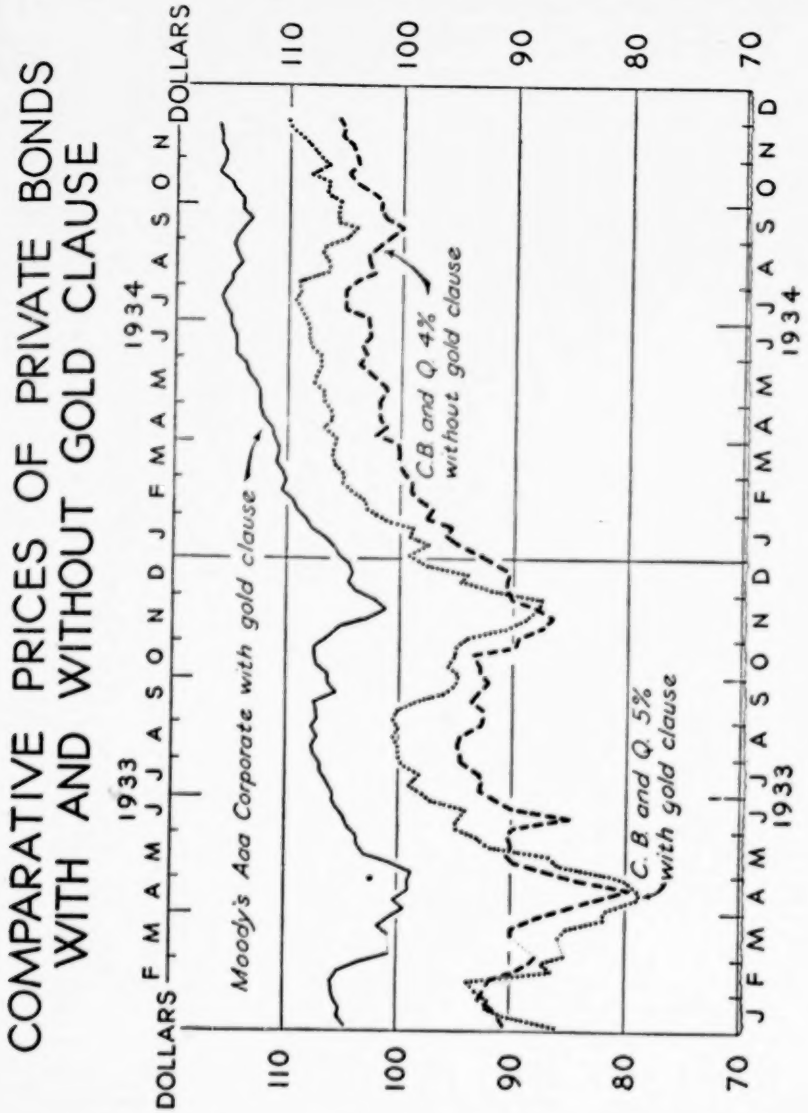
Treasury Department, Division of Research and Statistics, Dec. 31, 1934.

But assuming that the claimant is correct in his contention that the Joint Resolution constitutes a taking of his property and that there is an implied-in-fact agreement to pay just compensation therefor, it is submitted that the Government has provided just compensation for the claimant's property right.

In *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 326, this Court stated that where private property is appropriated for public use "a full and exact equivalent for it" should be returned to the owner. In *Olson* v. *United States,* 292 U. S. 246, 255, this Court held "that equivalent is the market value of the property at the time of taking * * *. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more."

It has not been possible to set forth a comparison of Federal gold-clause and non-gold-clause obligations for a period beginning before June 5, 1933, because all Federal obligations were considered to have the gold clause provided for in the Act of 1910 (36 Stat. 192). As the effect of the Joint Resolution was the same on private as well as public gold-clause obligations, a comparison of the market price of private gold-clause and non-gold-clause

obligations is equally significant. In the following chart the comparative market value of two bonds of the Chicago, Burlington and Quincy Railroad


COMPARATIVE PRICES OF PRIVATE BONDS
WITH AND WITHOUT GOLD CLAUSE
DOLLARS
110
100
90
80
70
F M A M J J A S O N D J F M A M J J A S O N D
1933
1934
Moody's Aaa Corporate with gold clause
C.B and Q 4% without gold clause
C. B and Q 5% with gold clause

are plotted. One of the bonds, dated 1908, promises to make payment of principal and interest "in lawful money." The other bond contains the con-

ventional gold clause. It will be noted that the relative value of these bonds remains substantially the same throughout 1933 and 1934. For purposes of relating this chart to the one appearing at page 28, the composite market price of the 30 Aaa corporation bonds has likewise been plotted. All of these bonds except the Chicago, Burlington and Quincy 4%-bond contain a gold clause.[52]

Moreover, if claimant had on June 5 received gold coin for his Liberty bond, he would have been required by the Act of March 9, 1933, and the Executive Orders issued pursuant thereto, to deliver the gold coin to a Federal Reserve bank, or, under the order of the Secretary of the Treasury, dated December 28, 1933, to the Treasurer of the United States in exchange for other coin or currency of the United States of an equivalent amount.[53] On June 5, 1933, there was no disparity of value in this

[52] This chart was prepared by the Division of Research and Statistics, United States Treasury Department and is based upon the tables collected in Moody's Investment Survey (1933 and 1934), and the Annalist (1933 and 1934). The non-gold-clause bond is a bond of the Chicago, Burlington and Quincy Railroad, maturing in 1958, bearing 4% interest, and issued under an indenture, dated March 2, 1908. This is the only non-gold-clause bond included among Moody's 30 Aaa corporate bonds. The gold clause bond is issued by the same corporation under an indenture, dated February 1, 1921, matures in 1971, and bears 5% interest. It should be noted that the Moody Aaa Index is based upon industrial and public-utility issues as well as railroads.

[53] See brief, in cases No. 471 and No. 472, pages 101 to 114.

country between gold coin and other money of the United States.[54] Nor was the value of gold bullion in this country in excess of $20.67 an ounce.[55]

An assumption that the market price of gold bullion in foreign countries was greater than its value in the United States does not sustain the claimant's contention. He was in no position to secure any asserted "world price" for any gold held or received by him in the United States, since the Executive Orders promulgated under the Act of March 9, 1933, prohibited the export of gold coin from the United States.[56] Such prohibition is clearly constitutional. *Ling Su Fan* v. *United States*, 218 U. S. 302. Claimant does not contest the validity of any of the statutes or orders relating to gold except the Joint Resolution.

Assuming claimant's theory of a taking to be sound, there is no basis for his contention that compensation must be made for the increased value of property accruing after the taking. *Olson* v. *United States*, 292 U. S. 246, and *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123.

The power to regulate the value of money is conferred by the Constitution upon the Congress. The value of money and conversely the monetary value of the metals in terms of which money is defined is for the Congress to determine. Accordingly, the

[54] See brief, in cases No. 471 and No. 472, pages 25 to 28 and 101 to 114.

[55] See brief, in cases No. 471 and No. 472, pages 101 to 114.

[56] See brief, in cases No. 471 and No. 472, pages 101 to 114.

usual rule that there must be a judicial determination of the value of property taken by the Government (see *Monongahela Navigation Company* v. *United States*, 148 U. S. 312) is inapplicable to the case of a "taking" by substituting payment in one form of money for another. In such a case the court must take as its yardstick of value the Congressional determination of the value of the money "taken" by the Government.

It is also evident that the claimant confuses destruction of property with a taking of private property for public use. Where private property has been taken for public use, a contract implied in fact arises for the payment of just compensation, and suit for just compensation may then be maintained in the Court of Claims. On the other hand, if the Government destroys property without taking it for public use, there is no contract implied in fact to pay compensation. Inasmuch, however, as the jurisdiction of the Court of Claims is limited to actions on contracts express or implied in fact, that tribunal may not entertain a suit for damages caused by the destruction of property. To abrogate a contract right is not to take private property for public use. To frustrate a contract is not to appropriate it. These principles were very clearly formulated and applied in *Omnia Commercial Company* v. *United States*, 261 U. S. 502, 508, 513:

> The contract in question was property within the meaning of the Fifth Amendment, *Long Island Water Supply Co.* v. *Brooklyn*,

166 U. S. 685, 690; *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S. 390, 400, and if taken for public use the Government would be liable. But destruction of, or injury to, property is frequently accomplished without a "taking" in the constitutional sense. To prevent the spreading of a fire, property may be destroyed without compensation to the owner, *Bowditch* v. *Boston*, 101 U. S. 16, 18; a doctrine perhaps to some extent resting on tradition, *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393. There are many laws and governmental operations which injuriously affect the value of or destroy property—for example, restrictions upon the height or character of buildings, destruction of diseased cattle, trees, etc., to prevent contagion—but for which no remedy is afforded. Contracts in this respect do not differ from other kinds of property.

* * * * *

In the present case the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the government.

The Government took over during the war railroads, steel mills, shipyards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the per-

formance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things.

6. The United States as a contractor is not liable to respond in damages in the Court of Claims for any breach of its proprietary and corporate contracts due to its public and general acts as a sovereign

It is well settled that the United States does not, as a general rule, secure by reason of its sovereignty advantages in contracts entered into in its corporate or proprietary capacity.[58] As a corollary, the only claims against the United States which the Congress has agreed may be the subject matter of suit in the Court of Claims are those "in which their sovereignty is nowise involved", that is, contracts entered into in its corporate or proprietary capacity.[59]

Assuming that a Liberty bond is a corporate or proprietary contract, it must follow, conversely, that the United States should not, in its corporate or proprietary capacity, be placed at a disadvantage by reason of its sovereignty.

---

[58] *United States* v. *Bank of Metropolis*, 15 Pet. 377, 391, 392 (1842); *Corliss Company* v. *United States*, 10 Ct. Cls. 494, 502 (1875), aff'd 91 U. S. 321 (1876); *Reading Steel Casting Company* v. *United States*, 268 U. S. 186, 188 (1925).

[59] *United States* v. *State Bank*, 96 U. S. 30, 36. The Court of Claims has jurisdiction only of suits on contracts in the true sense of the word as it applies to agreements between private parties. *Jones* v. *United States*, 1 Ct. Cls. 383.

In *Horowitz* v. *United States,* 267 U. S. 458 (1925), a case which arose in the Court of Claims, suit was brought on a contract to purchase goods from the New York Salvage Board and damages were claimed because of delay due to an embargo on shipments of freight laid by the United States Railroad Administration.

This Court stated in its opinion (p. 461):

> It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. *Deming* v. *United States,* 1 Ct. Cls. 190, 191; *Jones* v. *United States,* 1 Ct. Cls. 383, 384; *Wilson* v. *United States,* 11 Ct. Cls. 513, 520. In the *Jones Case, supra,* the court said: "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons * * *. In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for

> the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants."

It is established, therefore, that the United States, has in regard to its contracts, a dual capacity, and its liabilities as a contractor are divorced from its acts as a sovereign. It cannot be held liable in the Court of Claims for any variance in performance of an obligation due to a public and general act of the Congress. The Joint Resolution is such an Act.

II

SECTION 1 OF THE JOINT RESOLUTION OF JUNE 5, 1933, HAS THE EFFECT OF WITHDRAWING THE CONSENT OF THE UNITED STATES TO BE SUED ON GOLD CLAUSES

In *Lynch* v. *United States,* 292 U. S. 571, 580, this Court held that the withdrawal by the Congress of a right to sue the United States is not a violation of any constitutional right. Upon this point Mr. Justice Brandeis wrote as follows:

> Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened. A different rule prevails in respect to contracts of sovereigns. Compare *Principality of Monaco* v. *Mississippi,* ante, p. 313. "The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no

> pretensions to compulsive force. They confer no right of action independent of the sovereign will." The rule that the United States may not be sued without its consent is all embracing.
>
> * * * * *
>
> Although consent to sue was thus given when the policy issued, Congress retained power to withdraw the consent at any time. For consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration. *DeGroot* v. *United States,* 5 Wall. 419, 432. * * *

In the *Lynch* case the Court further pointed out that a mere withdrawal of the consent to sue on a contract would not imply repudiation (page 582).

Section 1 of the Joint Resolution of June 5, 1933, is in effect a withdrawal by the United States of any consent that may have theretofore been given to be sued on gold clauses in Government obligations.

The Joint Resolution of June 5, 1933, declares every provision contained in, or made with respect to, any obligation which purports to give the obligee a right to require payment in gold, to be against public policy. It further provides that every such obligation shall be discharged upon payment, dollar for dollar, in any coin or currency which at the

time of payment is legal tender for public and private debts. Clearly this is a declaration that as to Government bonds containing a gold clause, the gold clause would not be thereafter recognized. It is immaterial that the Resolution does not state in so many words that no suit shall be brought against the United States on a gold clause, or that any consent previously given on the part of the United States to be sued, is withdrawn as to gold clauses. The intent of Congress that no such suits should be maintained is clear.

The history of the Resolution inescapably leads to this conclusion. Acting under the provisions of Section 5 (a) of the Act of October 6, 1917, as amended, the President issued a proclamation declaring a bank holiday. On March 6, 1933, the Secretary of the Treasury issued instructions to the Treasurer of the United States and to the Director of the Mint, both orders being approved by the President. The Congress on March 9, 1933, approved and confirmed the steps thus taken. As a result thereof, there was a complete suspension of the redemption of currency in gold.

Obviously, if currency was not to be redeemed in gold, it was equally necessary, in fact, indispensable, that Government bonds should likewise not be paid in gold. To dispel any possible doubt on that question Section 1 of the Joint Resolution was enacted. One of its purposes was to forestall any attempt to enforce the gold clause in Government bonds. To argue that the right to sue on the gold

clause still remained would be to frustrate the will and the intent of the Congress and to subject the exercise of a sovereign power of Government as distinct from an act in its proprietary capacity to adjudication by the Court of Claims.

A serious doubt may exist in this case as to the right of the Court of Claims to adjudicate a claim which depends on its overturning an Act of the Congress. Since, however, it has not done so but has certified questions involving constitutionality to this Court, and since the Government and other parties in interest are anxious for a decision on the validity of the Joint Resolution, applying to both public and private obligations, it is deemed permissible to assume that this Court will not withhold its answer because of any doubt of authority in the Court of Claims to certify such questions. In this regard the course pursued here is not different from that adopted in *Booth* v. *United States,* 291 U. S. 339.

CONCLUSION

It is respectfully submitted that both questions certified by the Court of Claims should be answered in the negative.

HOMER CUMMINGS,
Attorney General.
J. CRAWFORD BIGGS,
Solicitor General.
ANGUS D. MACLEAN,
Assistant Solicitor General.
GEORGE C. SWEENEY,
Assistant Attorney General.
ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.
HARRY LEROY JONES,
Attorney, Department of Justice.

HERMAN OLIPHANT,
General Counsel, Treasury Department.
JOHN G. LAYLIN,
Assistant General Counsel,
Treasury Department.
BERNARD BERNSTEIN,
Attorney, Treasury Department,
Of Counsel.

JANUARY 1935.

APPENDIX A

Brief History of Section 4 of the Fourteenth Amendment to the Constitution

On April 30, 1866, the Joint Committee on Reconstruction reported to the Senate and the House of Representatives a joint resolution proposing an amendment to the Constitution of the United States, 71 Cong. Globe, 2265 and 2286. Section 4 of the proposed amendment provided as follows:

> Neither the United States nor any state shall assume or pay any debt or obligation already incurred, or which may hereafter be incurred, in aid of insurrection or of war against the United States, or any claim for compensation for loss of involuntary service or labor.

This resolution was adopted by the House on May 10, 1866 (71 Cong. Globe, 2545).

On May 23, 1866, Senator Wade introduced in the Senate some amendments to the foregoing joint resolution. He offered the following in place of Section 4 of the joint resolution:

> SEC. 3. The public debt of the United States, including all debts or obligations which have been or may hereafter be incurred in suppressing insurrection or in carrying on war in defense of the Union, or for payment of bounties or pensions incident

> to such war and provided for by law, shall be inviolable. But debts or obligations which have been or may hereafter be incurred in aid of insurrection or of war against the United States, and claims of compensation for loss of involuntary service or labor, shall not be assumed or paid by any State nor by the United States. (71 Cong. Globe, 2768.)

Senator Wade said in support of his amendments:

> In the next place, my amendment prohibits and renders null and void all obligations incurred in rebellion and insurrection against the United States or for the purpose of aiding rebellion or insurrection; and in that particular it is precisely the same as the corresponding section of the original proposition which was so eloquently defended and enforced by the Senator from Michigan. I agree with all that he said on that subject, and the proposition reported by his committee and the one I have submitted are the same in that respect; but then my amendment goes to another branch of this business almost as essential as that. It puts the debt incurred in the civil war on our part under the guardianship of the Constitution of the United States so that a Congress cannot repudiate it. (71 Cong. Globe, 2769.)

On May 29, 1866, Senator Howard of Michigan introduced in the Senate certain amendments which were decided upon in the caucus of Republican Senators which had met for a five-day period be-

ginning May 24, 1866. Senator Howard's statement with respect to section 4 of the Fourteenth Amendment is as follows (71 Cong. Globe, 2869):

> The obligations of the United States incurred in suppressing insurrection, or in defense of the Union, or for payment of bounties or pensions incident thereto, shall remain inviolate.
>
> Section four, as it now stands, will be changed to section five, and I propose to amend that section as follows: strike out the word "already", in line thirty-four, and also the words "or which may hereafter be incurred," in line thirty-five, * * *.[60]

It should be noted that Senator Howard's amendments struck out the words "which may hereafter be incurred" from the provision dealing with the debt incurred by the South in prosecuting the Civil War and also refrained from accepting Senator Wade's suggestion to include similar words in the section dealing with the public debt of the United States.

On June 4, 1866, the Senate agreed to the amendments proposed by Senator Howard (72 Cong. Globe, 2941). Thereupon Senator Fessenden stated:

> There is a little obscurity, or, at any rate, the expression in section four might be construed to go further than was intended, and

[60] Senator Wade withdrew his amendment after Senator Howard introduced his amendments.

> I have rather come to the conclusion that it was best to put sections four and five in one single section; and I ask the Chair, as section four has been adopted and also the amendments to section five, if it will be at any time in order to strike out both and insert a substitute for the two sections. (72 Cong. Globe, 2941.)

The presiding officer agreed that Senator Fessenden's amendments would come up in the Senate in their regular order. On June 6, Senator Clark, as a substitute for the 4th and 5th sections of the Howard amendment, offered the amendment of the Joint Committee on Reconstruction (of which Senator Fessenden was the chairman). This amendment consisted of one section which is the same as Section 4 of the Fourteenth Amendment as finally adopted. It was taken up for consideration on June 8. The following colloquy constitutes the entire discussion concerning such amendment:

> Mr. JOHNSON. I do not understand that this changes at all the effect of the fourth and fifth sections. The result is the same.
>
> Mr. CLARK. The result is the same.
>
> The amendment was agreed to. (72 Cong. Globe, 3040).[61]

---

[61] The claimant, at page 20, of his brief states:

"Had the Howard draft of Section 4 been finally adopted, it might have been claimed that the Amendment applied only to then existing obligations of the United States. The change from the form of the Howard amendment to the present form is, however, highly significant and was clearly intended to formulate a constitutional principle applicable

The resolution, as amended by the Senate, was passed by the House of Representatives on June 13, 1866 (72 Cong. Globe, 3149).

The claimant, on page 20 of his brief, states as follows:

> An amendment in the same form as Mr. Howard's (supra, p. 19) limiting its application to debts incurred in the Civil War, *was rejected.* (Italics his.)

Presumably the claimant means to suggest that when the Senate rejected this amendment proposed by Senator Doolittle it was specifically rejecting the words employed in Senator Howard's amendment. This is not borne out by the facts. At the time Senator Howard's amendment had been adopted and before Senator Clark introduced his amendment on June 6, Senator Doolittle offered an amendment. He stated:

> The effect of my proposition is that each of these sections shall be submitted as sepa-

---

to all public debt, future as well as present." The significance of the change from the Howard amendment to the amendment as finally adopted is shown by the colloquy between Mr. Johnson and Mr. Clark, quoted *supra*.

Furthermore, the claimant appears to misconstrue the minority report of the Joint Committee on Reconstruction. The words "no matter how contracted" in the quotation appearing on page 20 of claimant's brief is not to be construed as meaning "when contracted", but refers to types of governmental debts theretofore incurred, such as pensions, bounties, etc.

> rate articles, to be passed upon severally. That is the effect of the amendment of which I now give notice. (72 Cong. Globe, 2991.)

Accordingly, when the Senate rejected Senator Doolittle's amendment it was because the Senate did not want to have each section submitted as a separate article, and not because the Senate did not wish to accept the language employed by Senator Howard in his amendment.

See also Kendrick, *Journal of the Joint Committee on Reconstruction,* page 319, where he states:

> In vain did Doolittle, whom the Republicans called the apostate, plead with his former associates that they allow the various sections to be sent separately to the states for ratification.

And again, at page 350, Kendrick states:

> As for section 4, it was entirely unnecessary, and since it was designed to catch votes, especially those of the soldiers, it deserved to be classified as mere political buncombe.

See also page 282 of Kendrick's Journal.

There is nothing in Kendrick's report of the testimony taken by the Joint Committee on Reconstruction or in the Congressional debate with respect to the proposed Fourteenth Amendment to indicate that anyone was thinking about the problem of paying off the national debt in green-

backs or in coin of which the content might be reduced.[62]

[62] Kendrick, *Journal of the Joint Committee on Reconstruction*, at page 282 states that 28 witnesses (apparently from the South) before the Joint Committee "declared there was a general reluctance to pay taxes and the National debt and thought that if it were paid the Confederate debt should also be paid. * * *." Kendrick also quotes, pages 283, 284, some of the testimony taken before the Joint Committee, which testimony indicates the situation to meet which the first sentence of section 4 was adopted.

"Judge John C. Underwood, of New York, whom Lincoln made federal judge of the district court in Virginia:

"Question. Let me put a hypothetical case to you. Suppose that by means of a combination with the so-called Democratic party, *alias* copperhead party, *alias* conservative party, they, the rebels, should again obtain political power in Congress, and in the executive department; suppose this to be the result of a combination between the ex-rebel party in the South and this so-called Democratic party in the North; what would be the effect of that ascendancy upon the rebel states? What measures would they resort to.

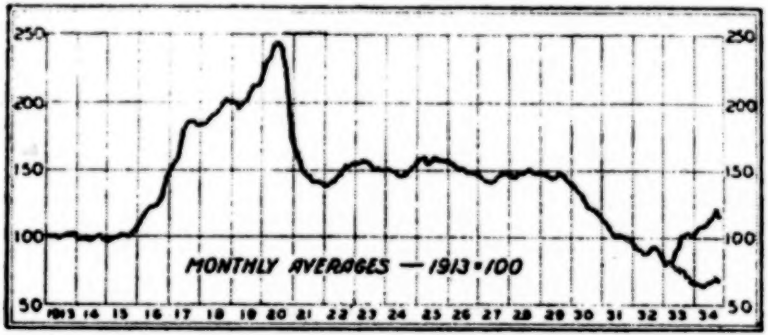
"Answer. They would attempt either to accomplish a repudiation of the National debt, or an acknowledgment of the Confederate debt, and compensation for their negroes. I think these would be their leading measures, their leading demands; and I think if either the rebel debt could be placed upon an equality with the National debt, or both could be alike repudiated, they would be satisfied. But the leading spirits would claim compensation for their negroes, and would expect to get it by such a combination.

"Homer A. Cooke, a former quartermaster in the United States Army, who had been stationed in North Carolina:

"Question. How do the ex-rebels feel about the payment of the Federal war debt? If it was left to them to vote *yes*

THE ANNALIST WEEKLY INDEX OF WHOLESALE COMMODITY PRICES
(1913=100)

[Unadjusted for Seasonal Variation]



or *no* on the question of paying it, what way would they vote generally?

"Answer. They would vote *no*, without doubt.

"Question. It would not be a very close struggle?

"Answer. It would be about as unanimous as the vote in this district on the question of negro suffrage."

FILE COPY

JAN 4 1935

October Term 1934

In The Supreme Court

OF THE

United States

JOHN M. PERRY,
Petitioner,
vs.
THE UNITED STATES,
Respondent.

No. 532

Motion for Leave to File, and Brief of Amici Curiae in Support of the Contentions of The United States of America

EDWARD E. GANN
Union Trust Building,
Washington, D. C.

GEORGE C. JOHNSON,
408 South Spring Street,
Los Angeles, California,
Amici Curiae.

In The Supreme Court

OF THE

United States

JOHN M. PERRY,
Petitioner,
vs.
THE UNITED STATES,
Respondent.

No. 532

Motion for Leave to File Brief Amici Curiae in Support of the Contentions of the Unted States of America

The undersigned move for permission to file the following brief as amici curiae herein.

The question involved in the present case is whether gold clause obligations are against public policy and factually and legally impossible of performance, so that they are invalid, illegal and unenforceable and the obligors are excused from further performance; and, if not, what are the rights of the obligees (1) where the obligor is unable and/or unwilling to pay lawful money, and (2) where obligee expresses a "willingness to accept" or the obligor "offers to pay" lawful money in lieu of the specific gold coin to secure a discharge of the gold clause obligation. In other words, to clarify the last sentence of Judge Faris in Re Mo. Pac. 7 F. Supp. 1 (Nos. 471, 472 consolidated herewith) as to what are the equities under which the obligee is entitled to re-

cover under the gold clause contract declared to be and held to be against public policy, invalid, illegal, unenforceable and factually and legally impossible of performance.

The undersigned George C. Johnson appears as the attorney of record in the following cases, wherein the identical question involved in this case is presented for determination; now pending in the District Court of the United States, Southern District of California, Central Division:

1) No. 6905—James, California Bank vs. George C. Johnson (the undersigned George C. Johnson); remanded to the Municipal Court, City of Los Angeles, California, as No. 351,206.

2) No. 6957—Cosgrave. Luena H. Gwin and George C. Johnson vs. Security-First National Bank of Los Angeles (the undersigned George C. Johnson, one of plaintiffs).

3) No. 412-H and 414—Holzer. Mortgage Guarantee Co. vs. J. E. Renaud (George C. Johnson, undersigned, counsel for defendant).

4) No. 426—Cosgrave. Pacific Hotel Apartment Co., et al., vs. Leigh M. Battson, et al., George C. Johnson, counsel for plaintiffs. On Dec. 10, 1934, Judge Corgrave ordered demurrer to complaint (for Declaratory Relief) sustained without leave to amend, unless plaintiffs would amend within ten days and allege that the obligor had offered to pay lawful money. Plaintiff obligor was unable to make such allegation, as the beneficiary had never expressed any willingness to accept lawful money, or any other substitute consideration, but had directed

trustee to sell for "Cash, lawful money of the United States" and beneficiary had already purchased at said sale the property originally appraised at about $3,000,000 for $260,000, as the sole bidder, and without payment of any consideration and merely by giving credit on the promissory note under its trust deed lien of approximately $1,500,000. The plaintiffs were unable to bid and were unwilling to pay $1,500,000 lawful money for property that was thus sold at public auction and bought by the beneficiary for only $260,000!

Also a number of other cases pending and others awaiting this decision to be filed. More detail re: said cases is set forth in the following brief on pages 4 to 6.

Due to the fact that the Attorney General of the United States has requested a consolidation of all cases pending and involving the gold clause problem to be determined as a test case herein to dispose of all points involved in Public Resolution No. 10 and The Gold Reserve Act, and due to the fact that the cases before this court only involve facts where the obligor offers to pay in lawful money to secure a discharge and does not involve facts where the obligor is unable and/or unwilling to pay lawful money, though the determination of the case must necessarily involve a determination of both these points, the briefs on file will not fully present the issues where neither party changes his position by injecting "an offer to pay" or a "willingness to accept" the substitute lawful money in lieu of the specific gold coin contracted for; and the undersigned will not be afforded an opportunity otherwise to present their views in connection therewith.

The rights of the undersigned as well as those of a million other homeowners will be determined by the decision in this case, involving homes of an estimated value of many billions of dollars, through gold clause obligations contained in trust deeds and mortgages, with power of sale in case of default. The decision should also determine the rights of the mortgagees and the trustees to sell under the power of sale, and a full decision of those rights will save the cost and delay of a trial of all those issues involved and which will require a million lawsuits if the issues are not determined herein. The national crisis also requires an early determination of these rights, and justify this application.

The attorneys for the respondent and the attorneys for petioner have consented in writing to the filing of this brief by the undersigned.

The undersigned therefore request that this court permit them to file the following brief as amici curaie in the above-entitled matter.

Dated: Los Angeles, December 26, 1934.

Edward E. Gann and
George C. Johnson.
Amici Curiae.

SUBJECT INDEX

PAGE

Preliminary Statement 1

Statement of the Case 7

ARGUMENT

I.

Citation, In Re Missouri Pacific Ry. Case 8

II.

Obligor May Not Do Indirectly What He is Prohibited from Doing Directly 9

III.

An Obligation Payable in Specific Coin or Currency is that and Nothing Else 9

IV.

The Law as Part of the Contract 11

V.

Public Resolution No. 10 Declares all Gold Clause Contracts to be Against Public Policy; It Does Not Say that the Obligation Must be Paid in Current Legal Tender 11

VI.

Excuses for Non-Performance 12

VII.

Quieting Title 14

VIII.

Trusts and Powers of Trustees 14

IX.

The Panic 16

X.

Conclusion 18